REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND

OTHER COURTS,

With Tables of the Cases and Principal Matters.

By PEREGRINE BINGHAM,

OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

VOL. I.

FROM TRINITY TERM, 3 GEO. IV. 1822, TO
HILARY TERM, 5 GEO. IV. 1824,

BOTH INCLUSIVE.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR JOSEPH BUTTERWORTH AND SON, 43, FLEET-STREET;

AND J. COOKE, ORMOND-QUAY, DUBLIN.

1824.

JUDGES

OF THE

COURT OF COMMON PLEAS,

During the Period contained in this VOLUME.

The Right Hon. Sir ROBERT DALLAS, Knt. Ld. Ch. J.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir JAMES BURROUGH, Knt.

Hon. Sir JOHN RICHARDSON, Knt.

The Right Hon. Lord GIFFORD, Ch. J.

A

TABLE

OF THE

NAMES OF CASES

REPORTED IN THIS VOLUME.

Butler

Fricker

Ladbroke

Richardson

CORRIGENDUM.

Page 432. lines 5. and 10. from the top, for "*Easter*, 3 *Geo.* 4.," read "*Michaelmas*, 3 *Geo.* 4."



CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Trinity Term,

In the Third Year of the Reign of GEORGE IV.

1822.

HUNT *v.* BELL.

June 8.

1. In an action for libelling the Plaintiff in his vocation as an exhibitor of sparring matches, the jury were directed to consider whether the Plaintiff's exhibitions were not illegal, as tending to form prize-fighters, the Judge declaring such to be his opinion, but recommending the jury to find a verdict for the Plaintiff, in order that the question might be fully discussed on a motion to set aside such verdict: a verdict having been found for the Defendant, the Court refused to grant a new trial.

2. *Semble*, that public exhibitions of sparring matches are illegal.

3. A party who pursues an illegal vocation has no remedy by action for a libel regarding his conduct in such vocation.

THIS was an action on the case, for a libel against the Plaintiff, in regard to his conduct as proprietor of a building called the *Tennis-court*, which, the declaration stated, he had himself appropriated, and had permitted others (for money therefore paid to him) to appropriate for, (amongst other lawful purposes) the

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exhibiting from time to time therein of sportive and amicable contests, or matches, in the art of pugilism, or boxing, with padded gloves, commonly called sparring, by and between persons skilled in such art, for the amusement of any persons desirous of being spectators thereof, and paying for their admission into such building a certain sum of money *per* head. • •

The general issue was pleaded. At the trial before *Dallas* C. J., *Middlesex* sittings after *Easter* term last, the above statement as to the nature of the exhibitions at the Tennis-court was fully made out, and also, that those exhibitions, consisting of sparring, chiefly by *professors* of pugilistic science, had always been conducted in the most orderly manner. There was no evidence that they were designed as a training or preparation for regular prize-fighting. The publication of the matter complained of was admitted by the Defendant, and it appeared to be clearly libellous; but the defence was, that the purpose to which the Plaintiff had appropriated the Tennis-court was illegal, as being, if not an absolute training for, preparatory to and promotive of, regular prize-fighting: and the preamble of the statute 25 *G.* 2. *c.* 36. *s.* 2. was referred to, as indicatory of the views entertained by the legislature on such matters.

Dallas C. J. first put it to the jury to consider, whether the Plaintiff's exhibitions were not illegal, as tending to form prize-fighters, declaring such to be his opinion at the moment, although he was unwilling to decide the point without further time for deliberation, and he then recommended the jury to find a verdict for the Plaintiff, which the Defendant might afterwards move to set aside, and so, fully discuss the question: but the jury found a verdict for the Defendant. Whereupon

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Bosanquet Serjt. now moved for a new trial, on the following grounds: The verdict was given under the supposition that the Plaintiff's vocation was illegal; but there was no evidence that his exhibitions were designed as a training or preparation for regular prize-fighting; and a mere exercise of pugilistic skill, divested of violence by the use of padded gloves, is not illegal, such exercise being not only unaccompanied with breach of the peace or danger, but being highly beneficial as promotive of bodily strength and agility, and as furnishing means of defence against unprovoked attacks. Prize-fighting has always been interrupted and repressed by the magistrates, but they have never interfered to prevent exhibitions of sparring, as they must have done if such exhibitions had been unlawful; and this is the first time the legality of them has been questioned. If it be unlawful in the way of exhibition, or otherwise, to give and receive instruction in the art of pugilistic attack and defence, those instructions being unaccompanied with violence or danger, except from accidents, which might equally occur in tennis, cricket, or other games, *à fortiori* must all instruction or practice in fencing, broad-sword exercise, or archery, be illegal; yet exhibitions of, and practice in the two former, have never been interrupted, though publicly carried on. There are numerous enactments for the encouragement of archery; and in *Rex* v. *Handy* (*a*) Lord *Kenyon* must be taken to have spoken of fencing as not illegal. The price demanded for admission would prevent exhibitions of this kind from occasioning idleness in the poorer classes of society; though, if it were otherwise, Lord *Coke* says (*b*), " When King *Edw.* 3., in the 39th year of his reign, commanded the exercise of archery and artillery, and prohibited the exercise of casting stones and bars, and

(*a*) 6 *T. R.* 286. (*b*) 11 *Rep.* 87., case of *Monopolies.*

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the hand and foot-balls, cock-fighting, *et alios vanos ludos*, yet no effect thereof followed till divers of them were prohibited upon a penalty by divers acts of parliament." But there is no act of parliament which forbids sparring exhibitions, and they do not fall even within the preamble of 25 *G.* 2. *c.* 36. *s.* 2. Stage representations they cannot be called, with more propriety than the feats of tumblers, which latter have been holden not to be stage representations within that act. *Rex* v. *Handy*.

DALLAS C. J. When this cause was tried, I certainly delivered an opinion, such as I could form at the moment, and under some difficulty; for I think there *may* be difficulty in this question, and I have wished for further time to consider it. Without going into matters foreign to the point under discussion, we know that, in the early periods of their history, it has been the practice of all civilized nations to train up their population to exercises of activity and courage; and, with a view to national defence, to promote emulation in amicable contests of strength. I stated to the jury the difficulty of distinguishing between fencing and boxing. Many persons, now present, can recollect the exhibitions of skill by *Angelo*, *Roland*, *St. George*, and others; and yet, is not fencing the art of attack, as well as of defence, and is it not more dangerous than boxing? But is fencing illegal? or is it illegal to attend a fencing-school? is it illegal to practise the bow and arrow? are archery meetings illegal? On all these views of the subject, I felt considerable difficulty. But, on the whole, when I consider that these sparring exhibitions are conducted by professors of pugilism; that they are meetings which may tend to encourage an illegal vocation, and to form prize-fighters, I see no reason for disturbing the present verdict.

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PARK J. If it were necessary for us to decide, whether exhibitions, such as those in which the Plaintiff was engaged, are illegal, I should wish for more time before I came to a conclusion, because exercises of such a kind have long existed. The argument drawn from the supposed legality of fencing exhibitions, would be stronger in favour of sparring exhibitions, if persons who learned fencing were trained to prize-fighting, as pugilists notoriously are; but such is not the case: and it having been put to the jury, whether the Plaintiff's exhibitions did not tend to form prize-fighters, I see no reason for disturbing the verdict.

BURROUGH J. I am of opinion, that the practice in question is illegal. The chief object for which persons attend these exhibitions is to see and judge of the comparative strength and skill of parties, who may be afterwards matched as prize-fighters, and that, frequently, to the loss of life; for there can be no doubt that the skill acquired in these schools enables the combatants to destroy life, in some instances, by a single blow; and it is notorious, that persons assembled at these exhibitions engage in illegal bets on the issue of such encounters.

RICHARDSON J. If the question were merely, whether it is lawful or unlawful for persons to learn the art of self-defence, whether with artificial weapons or such only as nature affords, there can be no doubt that the pursuit of such an object is lawful; but public prize-fighting is unlawful, and any thing which tends to train up persons for such a practice, or to promote the pursuit of it, must also be unlawful. The jury have found that the exhibitions in question have such a tendency, and I see no reason for disturbing their verdict.

Rule refused.

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June 11.

Glover, Assignee of the Sheriff of Hants, v. Coles and Others.

The condition of a replevin bond was, that Defendant should prosecute with effect his action, against Plaintiff for taking and unjustly detaining the goods and chattels of the Defendant, in the dwelling-house, farm-lands, and premises of the Defendant, *viz.* in the parlour, a carpet, &c., growing crops of corn in a field called *S.*, &c., and should make return thereof, if return should be adjudged; and should indemnify the sheriff and his officers for replevying the said goods and chattels.

The declaration stated the condition to be, that Defendant should prosecute with effect his action against the Plaintiff, for taking and unjustly detaining Defendant's goods and chattels in the said condition mentioned, and should make return thereof, if return should be adjudged, and should indemnify the sheriff and his officers for replevying the said goods and chattels: Held, that this was no variance.

DEBT on a replevin bond. In the declaration, the condition of the bond was stated to be, that if the Defendant, at the next county court, should prosecute his action with effect against the Plaintiff, for taking and unjustly detaining his goods and chattels in the said condition mentioned, and should make return thereof if return should be adjudged, and should save harmless and indemnified the sheriff, &c. for replevying the said goods and chattels, and from all actions, &c. in consequence thereof, then the obligation was to be void, otherwise in full force. At the trial before *Park* J., *Winchester* Lent assizes, 1822, the condition of the bond produced in evidence appeared to be, that the Defendant should prosecute with effect his action against the Plaintiff, for taking and unjustly detaining the goods and chattels of the Defendant in the dwelling-house, farm lands, and premises of the Defendant, viz. in the parlour, a carpet, hearth rug, &c.; growing crops of corn, 24 acres of wheat, then growing in a field called *Saverley*'s, &c.; and should make return thereof if return should be adjudged by the law, and also should indemnify the sheriff and his officers for the replevying the said goods and chattels. A verdict was found for the Plaintiff, with leave for the

Defendant

Defendant to move to enter a nonsuit, if the Court should be of opinion there was any variance between the condition stated in the declaration, and that which appeared on the bond produced in evidence. Accordingly,

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Pell Serjt., in the last term, moved for a rule *nisi*, arguing as follows: the bond declared on is conditioned to prosecute an action for taking and unjustly detaining goods and chattels. The bond produced in evidence is conditioned to prosecute an action for taking and unjustly detaining goods, chattels, and growing crops. Growing crops cannot be considered as goods and chattels for the purpose of obviating this objection; for growing crops were not distrainable at common law, whereas goods and chattels were; and growing crops are to be disposed of in a peculiar way pointed out by 11 *G.* 2. *c.* 19. *s.* 8., and adapted to that species of property. Secondly, the bond declared on is conditioned to return goods and chattels, if a return should be adjudged; the bond produced in evidence is conditioned to return goods, chattels, and growing crops. Then, as the penalty is double the amount of the distress, the penalty in the one bond would be considerably larger than in the other. A rule *nisi* having been granted,

Lens Serjt. now shewed cause against it. The condition of the bond is set forth in substance; for it enumerates the growing crops under the general description of goods and chattels, and whether correctly or no, is immaterial for the purpose of this declaration: but it may be contended, that, for the purpose of a replevin, such description is sufficient; for the statute 11 *G.* 2. *c.* 19. *s.* 8. says, that the appraisement and sale of corn after the time there pointed out shall be pro-

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ceeded in, towards satisfaction of the rent, in the same manner as other *goods and chattels* may be seised, distrained, and disposed of. So, in s. 23. the bond is to be taken for prosecuting the replevin, and for duly returning the *goods and chattels*, if return shall be adjudged. Under a *fieri facias* too, growing crops are taken as chattels.

Pell was heard in support of his rule.

PARK J. (*a*) I think the declaration is sufficient, and that there is no variance between the bond set out on record, and that produced in evidence. It could only be contended that this was a variance by reading the bond *reddendo singula singulis*; but the bond, after specifying all the articles distrained, is conditioned to indemnify the sheriff for replevying the *said* goods and chattels. Thereby clearly including the growing crops, which had been before specified under the head of goods and chattels. The bond, too, is conditioned to prosecute a replevin of goods and chattels in the house, and on the *farm* and *lands* of the plaintiff; by these latter must be intended the growing crops. Besides, if it were necessary, growing crops must, for this purpose, be considered as chattels under 11 *G.* 2.

BURROUGH J. The bond is correctly set out, as far as the setting out goes, and that is far enough for the Plaintiff's purpose.

RICHARDSON J. I think the declaration has sufficiently set out the condition of this bond. The condition is, that the Defendant shall prosecute with effect

(*a*) *Dallas* C. J. absent, being ill.

a re-

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a replevin of the goods mentioned in the bond; but he could not have prosecuted with effect unless he included in his action the growing corn which was mentioned as part of the goods and chattels. Besides, by the 11 *G.* 2. growing corn must be considered a chattel for this purpose.

JACKSON v. LOWE and LYNAM.

June 11.

The purchaser of 100 sacks of good *English* seconds flour, at 45*s.* a sack, wrote to the vendors as follows: "I hereby give you notice, that the corn you delivered to me in part performance of my contract with you for 100 sacks of good *English* seconds flour, at 45*s.* per sack, is of so bad a quality that I cannot sell it, or make into saleable bread. The sacks of flour are at my shop, and you will send for them, otherwise I shall commence an action." To which the vendors answered by their attorney, "Messrs. *L.* and *L.* consider they have performed their contract with you as far as it has gone, and are ready to complete the remainder; and, unless the flour is paid for at the expiration of one month, proceedings will be taken for the amount."

Held, that a jury was warranted in concluding that the contract mentioned in the vendors' answer, was the same as that particularised in the purchaser's letter, and that, therefore, the two writings constituted a sufficient memorandum of the contract under the 17th section of the statute of frauds.

THIS action was brought to recover damages for the non-performance of a contract for the sale and delivery of 100 sacks of good *English* seconds flour, at 45*s.* a sack. At the trial before *Garrow* B., *Stafford Lent* assizes, 1822, were given in evidence the two following documents: first, a notice from the Plaintiff to the Defendants,

"To Messrs. *Joseph Lowe* and *George Lynam*, of *Stoke* upon *Trent*, in the county of *Stafford*, millers.

"I, the undersigned, *Samuel Jackson* of *Hanley*, in the county of *Stafford*, grocer and flour dealer, do hereby give you notice, (as I have frequently done,) that the flour you caused to be delivered to me on *Wednesday* and *Thursday* last, (in part performance of my contract with you, for 100 sacks or bags of good *English* seconds flour, at 45*s.* per sack or bag, the whole of which were to have been delivered as on *Thursday* last,) is of so bad a quality, that I cannot either sell it as flour, or

make

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make it into saleable bread, as will appear by the samples of the flour and bread left at the office of Mr. *Adams*, attorney at law, in *Newcastle* under *Lyne*. I further give you notice, that the same bags or sacks of flour (with the exception only of the samples above alluded to,) are at my shop, and at your risk; you will, therefore, immediately on receiving this notice send for them away, otherwise I shall commence an action against you for trespass. And I lastly give you notice, that I not only hold you answerable, and expect you to fulfil your part of the contract above alluded to, in the course of this present week, but in addition thereto, make me ample remuneration for the loss I have sustained in consequence of your neglect, as I have always been, and still am ready to fulfil my part of the contract. Given under my hand this 24th day of *September*, 1821.

Samuel Jackson."

Next, the answer to the foregoing, written at the desire and under the instructions of the Defendants, by their attorney's clerk.

"*Stoke*, 27th *September*, 1821.

"Sir,

"I have your letter or notice of the 24th *September*, directed to Messrs. *Lowe* and *Lynam*, now before me; in reply to which, I have to state that Messrs. *L.* and *L.* consider they have performed their contract with you as far as it has gone, and are ready to complete the remainder; and I have also to inform you, that unless the flour is paid for at the expiration of one month from the 20th instant, proceedings will be taken against you for the recovery of the amount, without any further notice.

"I am, Sir,
"Yours obediently,
"*Wm. Williams.*

"To Mr. *S. Jackson*, Baker, *Hanley*."

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Sixteen sacks of flour, it appeared, had actually been delivered; but it being disputed whether or no there had been on the part of the Plaintiff, such an acceptance of them as would render unnecessary a note or memorandum of the contract under the 17th section of the statute of frauds, it was contended for the Plaintiff, and denied for the Defendant, that the above notice and the answer to it, taken together, constituted a sufficient memorandum of the contract, under the provisions of that statute. A verdict having been found for the Plaintiff,

Bosanquet Serjt., in the last term, moved for a rule *nisi* for setting aside this verdict and entering a nonsuit, or for a new trial, on the ground, that though two distinct writings might be coupled, so as to make a memorandum of contract, the above notice and answer to it did not, taken together, constitute a sufficient memorandum of the contract under the statute of frauds; he contended, that the Plaintiff's notice being framed with the expression, "*my contract*," and the Defendants' answer with the expression, "*their contract*;" instead of *the* contract, or *the contract in your notice*, there was nothing from which the jury, in the absence of further evidence, were warranted to infer that the contract mentioned in the answer was the same as the contract mentioned in the notice. The Defendants would not have been prevented (by any thing which their answer contained) from shewing that the contract which they had there in view, was different from the contract described in the Plaintiff's notice. If they could have shewn that, there was no memorandum authenticated by both parties, of the contract on which the Plaintiff had declared.

A rule *nisi* having been granted,

Pell

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Pell Serjt. now shewed cause against, and *Bosanquet* supported the rule.

PARK J. (*a*) In this case, I think there was a sufficient note in writing of the contract on which the Plaintiff sued. It is admitted, that two distinct writings may be coupled together and constitute a memorandum within the intention of the statute, and there are decisions to this effect: *Saunderson* v. *Jackson* (*b*), *Schneider* v. *Norris.* (*c*) The question therefore is, whether the jury were not warranted in concluding, there was in this case a sufficient note in writing. The writing must clearly refer to the contract, which is the ground of action; but how can there be a clearer reference than in the Defendants' letter? The notice contains an assertion of the contract, specifying the quantity, quality, and price of the flour, and to this contract the answer most clearly refers, disputing none of the terms of it, nor mentioning any other terms, but asserting a part performance.

BURROUGH J. It is quite impossible for the most scrupulous man to doubt that on these two papers there is sufficient evidence in writing of the Defendants' contract.

RICHARDSON J. I think these two papers were a sufficient memorandum or note in writing of the Defendants' contract, according to the provisions of the statute of frauds. The Plaintiff in his notice states the terms of the contract, and the Defendant by his answer recognizes them sufficiently to warrant the jury in concluding, that both parties had the same contract in view.

(*a*) *Dallas* C. J. absent, being ill.

(*b*) 2 *B.* & *P.* 238.

(*c*) 2 *M.* & *S.* 286.

It

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It is admitted, that if the Defendants had written, "they have performed the contract mentioned in your notice," it would have been sufficient; but the jury have found, and I think satisfactorily, that this was the contract referred to; *Saunderson* v. *Jackson* is in point, and the rule must be

Discharged.

HOPKINSON v. SMITH.

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An attorney cannot recover a charge for conducting a suit in which the party charged has not had the benefit of the attorney's judgment and superintendence. Therefore, where, in an action on an attorney's bill, it appeared that the Plaintiff lived at *D.*, five miles from *W.*, that the Defendant lived at *H.*, fourteen miles from *W.*, and applied to *J. B.* (who resided at *W.*, and who had been a clerk of the Plaintiff's, and practised in his name) to carry on the suit for which the bill in question was incurred; *J. B.* carried on the suit, and it did not appear that the Defendant ever saw the Plaintiff, or had the benefit of his judgment; the business done at the office at *W.* was for *J. B.*'s benefit, except one-third, which the Plaintiff received for coming over once a-week to shew his face; Plaintiff's name was not on the door at *W.*, nor was it employed by *J. B.* in soliciting business; but *J. B.* frequently consulted with Plaintiff; drafts were sometimes engrossed at *D.* for the office at *W.*; the draft of the brief in the suit which *J. B.* had carried on for Defendant, was in the hand-writing of Plaintiff, as well as some items in *J. B.*'s books touching that suit; he Defendant, when applied to, admitted the sum claimed, but required to set off a sum due to him from *J. B.*, which was refused:

Held, that a nonsuit, directed by the Judge who tried the cause, was proper.

THIS was an action by the Plaintiff, an attorney, to recover the amount of his bill, for business done for the Defendant, in a suit by the Defendant against one *Naylor*. At the *York Spring* assizes, 1822, before *Bayley* J., the case appeared to be as follows: The Plaintiff resided at *Dewsbury* in *Yorkshire*, five miles from *Wakefield*. The Defendant lived at *Huddersfield*, fourteen miles from *Wakefield*, and applied to *John Berry*, (who resided at *Wakefield*, and who had been a clerk of the Plaintiff's, and practised in his name, but was not an attorney,) to commence the suit against

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Naylor. *Berry* then carried on the suit, and it did not appear that the Defendant was ever seen with the Plaintiff, or had the benefit of the Plaintiff's judgment in the management of the business.

The business done at the *Wakefield* office by *Berry*, was for *Berry's* benefit, except one-third which the Plaintiff was to have as a remuneration for his loss of time, in coming over once a week to shew his face. In soliciting for business, his name was seldom or never introduced, nor did it appear on the door of the office at *Wakefield*, but *Berry* frequently consulted with the Plaintiff; drafts were sometimes engrossed at *Dewsbury* for the office at *Wakefield*; the draft of the brief in the Defendant's action against *Naylor*, was in the Plaintiff's hand-writing, and had been settled by him, and some of the entries in *Berry's* books respecting the items in the Defendant's suit against *Naylor*, were in the Plaintiff's hand-writing. When the bill, for which the present action was brought, was delivered to the Defendant, he admitted that the sum was due; but complained that it was a hard case, as he had a bill against *Berry* for spirits, and should expect the amount to be deducted. This was refused by the Plaintiff.

Upon these facts the learned Judge directed the Plaintiff to be nonsuited, on the ground, that no retainer of the Plaintiff was proved; that before a party could be called on to pay an attorney's bill, he ought to have had the benefit of an attorney's judgment, which the Defendant in this case had never obtained; and that if the transactions between *Berry* and the Plaintiff amounted to a partnership, the action should have been brought in both their names.

Hullock Serjt. moved for a new trial, contending, that the proof of a retainer was rendered unnecessary, by the Defendant's having admitted the amount claimed

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to be due; that it was allowable and usual for attornies to station clerks at a distance for the purpose of taking instructions, and that it appeared, that the Defendant had in this case, had the benefit of the Plaintiff's judgment, the brief having been proved to be in his handwriting. As to the supposition of a partnership between *Berry* and the Plaintiff, a per centage on the amount of business procured, would not of itself constitute a partnership, inasmuch as it had been decided, that the paying an agent by a proportion of the profits of an adventure, did not amount to a partnership. *Meyer* v. *Sharpe*. (a)

A rule *nisi* having been granted,

Vaughan Serjt., who shewed cause against it, in addition to the reasons for the nonsuit given by the learned Judge at the trial, pointed out the injustice of depriving the Defendant of his set off against *Berry*, when there had been no communication or privity of contract between him and the Plaintiff.

Hullock was heard in support of his rule.

PARK J. (b) It is clear on principles of public policy, that this nonsuit ought not to be set aside, because, from the earliest times since parties have been allowed to appear by attorney, there has been great anxiety on the part of the legislature, to keep that branch of the profession pure, and the Judges are entitled to see when a charge is made for the assistance of an attorney, that such assistance has been *bonâ fide* given. Here, the Defendant, knowing nothing of the Plaintiff, (who was only to shew his face occasionally,) applied to *Berry*, who was indebted to him for a quantity of spirits; and *Berry*

(a) 4 *Taunt*. 74. (b) *Dallas* C. J. absent, being ill.

might

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might have been selected to perform the Defendant's business, with the decided intention, that the debt due from him should be set off against the charge for such business. I do not say it would not be a sufficient exercise of the business of an attorney, if in a place where he carries on his business, or where he may have two offices, he should sometimes refer his clients to a clerk, because, in such a case, the constant opportunity of conference with the clerk, enables the client to have the benefit of the attorney's judgment; but the circumstances are very different here, and *Berry* acted altogether without assistance. Since the trial of this case, another similar in its circumstances has been tried at *Lancaster* before Mr. Justice *Holroyd*, who decided in the same way as Mr. Justice *Bayley*.

BURROUGH J. Independently of the general question, on the facts of this case it is clear the Plaintiff cannot maintain his action. But the general question is of great importance; we are bound to admit attornies, to examine them, to punish, and to regulate their conduct in regard to their clients; but what control can we have over the attorney, where the client has no communication with him. The present is not the case of an attorney who superintends another business at a little distance from his own office, but of one who seldom appeared, who never gave the benefit of his judgment in this case, and who paid the clerk, not a salary, but a proportion of the profits of the business.

RICHARDSON J. On the facts of this case, independently of any rule of law, this nonsuit ought to stand; because *Berry*'s participation in the profits seems to amount to a partnership, and *Hopkinson*, probably, sued alone, because such a partnership was illegal. But the charge he makes against the Defendant is illegal on general

general grounds: it is the business of an attorney to instruct his clerk, in order to render him competent to pursue his profession; but here the attorney lived in a distant town; the clerk was without instruction, and the client without the benefit of the attorney's judgment.

Rule discharged.

IN THE EXCHEQUER CHAMBER.

DILLON v. DOE Dem. PARKER.

June 14.

If a party who, at the trial of a cause, has tendered a bill of exceptions, brings a writ of error before he has procured the Judges' signature to the bill of exceptions, he thereby waives the bill of exceptions, and will not be permitted by the Court of Error afterwards to append the bill of exceptions to the writ of

AT the trial of this cause, a bill of exceptions had been tendered, but a verdict having been found for the Defendant in error, he entered up judgment in the term succeeding the trial. The Plaintiff in error immediately removed the cause into this court by writ of error, but could not agree with the Defendant in error as to the terms of the bill of exceptions, so that the Judge's signature had never been obtained; and now, when a year had elapsed since the commencement of the suit in error, when the common assignment of errors had been made, and issue joined thereon,

part of the Plaintiff in error, moved for a rule to shew cause why the Defendant in error should not be compelled to settle the bill of exceptions, and why it should not be appended to the writ of error.

W. E. Taunton, who opposed the rule, pointed out the delay which a Plaintiff in error might occasion, if,

 after

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after lying by for a twelvemonth, he could succeed in such an application: he contended, that the Court had no jurisdiction to cause anything extraneous to be appended to the writ of error; and cited *Wright* v. *Sharp* (a) to shew the jealousy with which proceedings of this nature were watched.

The Court thought that the Plaintiff in error had waived his bill of exceptions, by bringing a writ of error before the bill of exceptions was signed, and that they had no authority to take the step which the Plaintiff in error proposed. *Chitty*, therefore,

Took nothing by his motion.

(a) *Salk.* 288.

June 14.

WANT v. REECE.

Covenant by *A.* on dissolution of partnership with *B.*, to leave 150*l.* in a banker's hands till *March*, 1822, as a security towards payment of any demands which might be made on *A.* in respect of debts contracted by *B.* on account of the credit of the partnership; the sum, after *March*, 1822, subject to such claims as might have been made as aforesaid, to be paid over to *B.* Breach, that though *B.* had contracted no such debts as aforesaid, and though no claim had been made, *A.* prevented the banker from paying the said sum over to *B.* after *March*, 1822. Plea, that a claim or demand was made on *A.* in respect of a debt of 200*l.* by one *T. H.*, *as being* a debt contracted by *B.* on account of the credit of the said partnership: Held, ill.

THE Plaintiff declared, in *Easter* term, 1822, on a covenant, which the Defendant, on dissolving a partnership between himself and the Plaintiff, had entered into, and by which it was stipulated, that a sum of 150*l.*, deposited by the Defendant at a banker's in the names of two trustees, should be retained by them till the 31st of *March*, 1822, as a security for and towards payment of any demands which might be made on the Defendant in respect of any debts contracted by

the

the Plaintiff, on account of or on the credit of the said partnership, since the 14th of *January*, 1820, and from and immediately after the said 31st of *March*, to the intent that the same sum, subject to any such claims and demands as aforesaid, should be paid to the Plaintiff's solicitor for the use of the Plaintiff.

Breach, that, though no claim or demand, from the time of the Defendant's entering into the covenant till the time of Plaintiff's declaring, had been made on the Defendant, or on, to, or of the said sum deposited in the banker's hands, in the names of the trustees, or any part thereof, in respect of any debt contracted by the Plaintiff, on account of or on the credit of the said partnership, since the 14th day of *January*, 1820; and although the Plaintiff had not contracted any such debt or debts, the Defendant, after his entering into the said covenant, and after the 31st of *March*, 1822, did prevent and hinder the said Plaintiff's solicitor from receiving the said sum of money, or any part thereof, for the use and benefit of the Plaintiff, or otherwise howsoever, by requesting the banker not to pay the same to the said solicitor, and the same was thereby wholly unpaid to the said solicitor, or the Plaintiff.

Plea, that after the Defendant's entering into the said covenant, and before the commencent of the suit, a claim or demand was made on the Defendant in respect of a debt of 200*l.* by one *John Hutchins*, as being a debt contracted by the Plaintiff on account of of on the credit of the said partnership, since the 14th *January*, 1820. Demurrer and joinder.

Pell Serjt., in support of the demurrer, urged, that it was not stated, nor did it appear, that the claim or demand mentioned in the plea was made on the Defendant in respect of any debt actually contracted by the Plaintiff, on account of or on the credit of the partnership, since the 14th day of *January*, 1820.

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Vaughan Serjt., in support of the plea, urged, that the intention of the parties, as it might be inferred from the stipulation in question having been required and given on the dissolution of a partnership, was, that the Defendant should be protected, not only against just debts, incurred by the Plaintiff on the partnership account, but against all demands of whatever kind on that account. That it was peculiarly within the Plaintiff's knowledge, whether or no such a demand was in respect of a just debt, and if it was not, he might reply the fact; while, if the Defendant were, at his own peril, to contest an action for an unjust demand, he would fall into the very inconvenience, to protect him from which was the express object of his stipulation.

But *The Court* held, that the plea was clearly bad, and gave

Judgment for the Plaintiff.

June 14.

WHITE *v.* ROYAL EXCHANGE ASSURANCE.

Held, that where the Plaintiff's attorney was indebted to the Plaintiff in a sum greater than the attorney's costs in the cause, the agent (to whom the Plaintiff's attorney was indebted on a general account in a sum greater than the amount of the attorney's costs) could not, as against the Plaintiff, retain out of the sum recovered by the Plaintiff more than the charge for agency in that particular cause.

LENS Serjt., upon an affidavit that the Plaintiff's attorney was indebted on bond to the Plaintiff in a sum greater than the amount of the attorney's taxed costs in this action, moved that the damages and costs in this action should be paid over to the Plaintiff's executors, or their attorney, the Plaintiff being dead. It appeared that the Plaintiff's attorney was also indebted upon a general account to his agent, to an amount greater than the sum which would have been payable to the

Plaintiff's

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WHITE v. ROYAL EXCHANGE ASSURANCE.

Plaintiff's attorney as his costs in this cause, and that the agent therefore insisted on retaining, out of the sum payable to the Plaintiff from the Defendants, not merely his charge for agency in the particular cause, but a sum equivalent to what would have been the attorney's costs. *Lens* insisted that the agent had no lien as against the Plaintiff, except for his agency in the particular cause.

Peake Serjt., on the part of the agent, shewed cause in the first instance, and cited *Hullock* on Costs, 529. 2d edition, and *Bray* v. *Hine* (a), contending, that the agent was entitled to his general lien against the attorney to the amount of what would have been the attorney's costs, because he could know nothing of the arrangements between the Plaintiff and his attorney, but must have supposed the business between them would be carried on in the usual way.

But *The Court* made the rule absolute, on the Plaintiff's paying for the agency in this particular cause; *Richardson* J. observing, that if the Plaintiff had applied at once to the agent to deliver up papers, the agent, as against the Plaintiff, could not retain them after receiving the amount of his agency on those papers.

Rule absolute.

(a) 6 *Price*, 203.

June 18.

FRICKER Demandant, FAIRBANK Tenant, BISHOP Vouchee.

Recovery of *land* amended by inserting *meadow* and *pasture*.

THIS was a recovery of 40 acres of land; but the nature of the land not having been specified, either in the recovery or the deed to lead the uses,

The Court, on a motion by *Bosanquet* Serjt., and on an affidavit by the vouchee, that the land consisted of meadow and pasture, amended the recovery by inserting the words 40 acres of *meadow* and 40 acres of *pasture* land.

June 18.

COX Demandant, INCE Tenant, GILL Vouchee.

Recovery. Amendment of *præcipe*.

THE name of the vouchee having, by mistake, been inserted in the *præcipe* of this recovery instead of the name of the tenant, the Court, on the motion of *Vaughan* Serjt., amended the *præcipe*, by substituting the name of the tenant for that of the vouchee.

Vaughan cited *James* demandant, *Williams* tenant, *James* vouchee. (*a*)

(*a*) 1 *B. Moore*. 130.

1822.

BYNNER *v.* RUSSELL.

June 19.

Averment in a declaration on a bill of exchange, that "afterwards, and when the bill became due, according to the tenor and effect thereof, to wit, on the 31st of *March*, 1822, it was in due manner, according to the usage and custom of merchants, presented for payment:" Held, sufficient, on a special demurrer, assigning for cause that the said 31st of *March* was a *Sunday*.

ASSUMPSIT on a bill of exchange. The declaration, after stating the delivery of the bill to the Plaintiff, averred that, "afterwards, and when the said bill of exchange became due, and payable, according to the tenor and effect thereof, to wit, on the 31st day of *March*, in the year 1822, to wit, at *London*, &c., the said bill of exchange was, in due manner, and according to the usage and custom of merchants, presented and shewn" for payment.

Special demurrer, and cause assigned, that the 31st of *March*, 1822, in the declaration mentioned, and specified to have been the day on which the supposed bill was presented for payment, was a *Sunday*, and, therefore, the bill ought not to have been presented for payment on that day, but on the day before. Joinder.

Lawes Serjt., for the Defendant, insisted that such an averment could not be supported on special demurrer.

But *The Court* held, that even on special demurrer, the day was immaterial, being specified under a *to wit*, and, in an averment, that the bill was presented when it became due and payable.

Judgment for the Plaintiff.

1822.

June 19.

Doe Dem. Tennyson *v.* Lord Yarborough.

Waste land belonging to a vicarage, which land had remained uninclosed and useless from the inability of the vicars to incur the expense of enclosure, was let (having never been letten before), by the incumbent (with the confirmation of patron and ordinary), to *C. A. P.* for three lives; *C. A. P.* undertaking to reclaim the land, and to pay a rack rent which was the most that could be obtained: Held, that this lease was not binding on the incumbent's successor.

THIS was an action of ejectment, brought to recover about an acre of land, situate in the parish of *Great Grimsby*, in the county of *Lincoln*, called the *Old Churchyard*. The demise was laid on the 19th of *October*, 1815. At the trial, at the Spring assizes for *Lincolnshire*, 1822, a verdict was found for the Plaintiff, subject to the opinion of the Court on the following case:

At the time of the demise mentioned in the declaration, the lessor of the Plaintiff had been duly presented, instituted, and inducted, into the vicarage of the parish and parish church of *Great Grimsby*, and was then the lawful vicar thereof. The land in question is part of the possessions of the vicarage, and it was not proved to have been letten before the execution of the lease hereinafter mentioned, but lay in the state described in the said lease, which lease, made on the 2d day of *February*, 1776, between the Rev. *L. Haldenby*, then vicar of the parish church of *Grimsby*, clerk, of the first part; *C. A. Pelham*, Esq., of the second part, and *John Lawrence* and *William Lister*, of the third part, (after stating, that part of the possession of the vicarage, consisting of one piece or parcel of land, containing by estimation one acre, lying in *Grimsby*, had not been fenced in the memory of man, and that, therefore it had been of very little benefit to any of the vicars of *Grimsby*; that fences could not be made new but at a great expense, which the vicars could not defray, so that the land lay open to the common, and many people laid their rubbish, dung, furze, and fuel thereon, without having leave of *L. Haldenby* for so doing, and that *C. A. Pelham* had agreed with *L. Hal-*

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L. Haldenby, in consideration of the grant and demise in those presents contained, at his own expense, substantially to fence and inclose the said piece of ground on every side, insomuch as there would thereby be an improvement thereof, to the benefit and advantage of *L. Haldenby* and his successors,) — witnessed, that *L. Haldenby*, for and in consideration of the rent, covenants, and agreements therein specified, and for divers other good causes and considerations him thereunto moving, had demised, granted, and to farm letten, unto *C. A. Pelham*, his heirs and assigns, all that the said piece of ground, &c. to have and to hold unto the said *C. A. Pelham*, his heirs and assigns, from the making of the said indenture, for and during the natural lives of *C. A. Pelham* and two other persons therein mentioned, yielding and paying therefore, yearly, during the said term, unto *L. Haldenby* and his successors, vicars of *Grimsby*, the annual rent of one pound, free from all deductions and abatements whatsoever, being the most rent that the premises could be let for; and that if it should happen that the said yearly rent should be behind or unpaid, in part or in the whole, by the space of forty days next after either of the days of payment thereby appointed, the same being lawfully demanded, then, or at any time after, it should be lawful to and for *L. Haldenby* and his successors, vicars of *Grimsby*, into the said premises thereby demised to re-enter, and the same to have again, repossess, and enjoy, as in their former estate. And *C. A. Pelham*, for himself, his heirs, executors, administrators, and assigns, did covenant, to and with *L. Haldenby* and his successors, vicars of *Grimsby*, that he the said *C. A. Pelham*, his heirs, executors, administrators, or assigns, should, on or before the 2d day of *February* then next ensuing, fence

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fence and inclose the said piece of ground on every side, at his or their own proper costs and charges, and should afterwards, during the said term, repair the fences so made with all manner of needful reparations, as often as need should require, and at the determination of the said term, the same, well and sufficiently repaired, would yield up to *L. Haldenby* or his successors, vicars of *Grimsby*; and also, that *C. A. Pelham*, his heirs, &c. should, during the said term, discharge all taxes, assessments, and other payments whatsoever that should be charged on the said piece or parcel of ground, or on *L. Haldenby*, for or in respect thereof. *Lawrence* and *Lister* were appointed attornies by *Haldenby* for the purpose of making livery of seisin.

The lease was executed by *L. Haldenby*, who was, as described in the lease, vicar of *Grimsby*. A memorandum of livery of seisin was indorsed on the lease.

There was annexed to one corner of the lease a separate deed, purporting to be the confirmation of the same lease by *Thomas* Lord *Middleton*, patron of the vicarage of *Grimsby*. It did not appear otherwise than by the said deed of confirmation that *Thomas* Lord *Middleton* was such patron.

There was also annexed to another corner of the lease another deed, puporting to be the confirmation of the lease by the ordinary, to which was affixed the episcopal seal of *John* Bishop of *Lincoln*.

C. A. Pelham is since *Charles* Lord *Yarborough*, the Defendant, and he had been in the possession of the lands in question, either by himself or his undertenants, ever since the making of the said lease.

When *L. Haldenby* died, he was succeeded in the vicarage by the Rev. *J. Stockdale*, who died in *April*, 1815, and he was succeeded by the lessor of the Plaintiff.

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The question was, whether the said lease and confirmations were binding upon the lessor of the Plaintiff, who was, at the time of action, incumbent of the said vicarage.

Doe dem. TENNYSON v. Lord YARBOROUGH.

If not, the verdict was to stand for the lessor of the Plaintiff; but if binding, then a verdict was to be entered for the Defendant.

The Court, stopping *Lawes* Serjt., who was to have argued for the lessor of the Plaintiff, called on *Hullock* Serjt., who was for the Defendant, to support the lease, and enquired how he could reconcile such a letting of lands which had never been letten before, with the words of the statute 13 *Eliz.* c. 10. *s.* 3., that all leases by any vicar, "other than for the term of one-and-twenty years or three lives," — "whereupon the accustomed yearly rent or more shall be reserved," — "shall be utterly void;" or distinguish this case from *The Bishop of Hereford* v. *Scory* (*a*)

Hullock Serjt. The object of this statute, as well as of 32 *H.* 8. *c.* 28. *s.* 2., was to prevent clergymen from injuring their successors by granting long leases and taking fines on low rents of their own imposing; the meaning, therefore, of the clause in question must be, that the accustomed rent should be taken where any rent has existed before; and where not, the best rent that can be gotten. The intention of the legislature was, to secure the best rent for ecclesiastical property, which intention has been completely effected in the present instance; and there are numerous cases where clauses in deeds, that lands shall be let for the accustomed yearly rent or *more*, have been construed accord-

(*a*) *Cro. Eliz.* 874.

ing

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ing to the intention of the parties. *Goodtitle dem. Clarges* v. *Funucan.* (a)

Sed per Curiam. In order to meet the expression in the statute, "Whereupon the accustomed yearly rent or more shall be reserved," there must have been some rent reserved before. Our decision must proceed on the statutes taken together; and, considering them, it is clear that the demise, in order to be valid, must be of lands which have been demised before.

(a) *Dougl.* 565.

June 22.

DOE Dem. BLIGH *v.* COLMAN.

Power in a will, to let such part of the testator's premises as had been usually granted, or demised, and were then in lease for any term of years, determinable on lives, to any persons for the like terms, and in like manner, and under the like rents, services, and conditions, as the same had been usually granted; and the residue of the same premises unto any person for any term of years not exceeding 21 years in possession, at the best rent that could be reasonably gotten for the same. So as that no such demise or lease should be made dispunishable of waste, nor without a condition of re-entry on non-payment of the rent or services thereby reserved, and so as each lessee should execute a counterpart of his lease: Held, that a lease made under this power, of lands, which were in lease at the time of the creation of the power, the second lease accurately following the terms of the former lease of the same land, was well executed under this power, though the second lease did not contain a clause of re-entry on non-payment of 40*s.* reserved in lieu of a heriot; the first lease containing no clause of re-entry on non-payment of a like reservation.

THIS was an action of ejectment, for a messuage and land in *Cornwall.* At the trial, before *Best* J., at the *Bodmin* Summer assizes, 1821, the learned Judge directed a nonsuit to be entered, with liberty to the Plaintiffs to move to set aside the same, and to enter a verdict for the Plaintiff. A rule *nisi* having been obtained for that purpose, the Court of Common Pleas desired the facts might be stated in a special case.

W. Pen-

W. Pennington, being seised in fee-simple of the premises in question, by his last will and testament, dated the 23d day of *May*, 1783, and duly executed and attested so as to pass real estates, devised the premises in question to trustees in fee, in trust for his sister, *S. Hosken*, widow, and her assigns, for life; remainder, upon trust, for his niece, *Nancy Gilbert*, the wife of *W. R. Gilbert*, for life, with remainder over; and the testator, by his will, provided and declared, that it should be lawful for his said sister, *S. Hosken*, and his said niece, *N. Gilbert*, respectively, during their respective lives, and when they respectively should be in the actual possession of the said premises, by indenture or indentures under their respective hands, to demise and lease the same premises in manner following, *viz.* such parts of the said premises as had been usually granted or demised, and were then in lease for any term of years determinable upon lives, to any persons, for the like terms, and in like manner, and under the like rents, services, and conditions as the same had been usually granted; and the residue of the same premises unto any persons for any term of years not exceeding twenty-one years, in possession, at the best and most improved rent that could be reasonably gotten for the same, so as that no such demise or lease should be made dispunishable of waste, nor without a condition of re-entry on non-payment of the rent or services thereby reserved, and so as each lessee should execute a counterpart of his or her lease.

The testator died, after making and publishing his said will, without altering or revoking the same: the said *S. Hosken* died soon after the testator, and before the 25th day of *November*, 1815.

W. R. Gilbert and *Nancy* his wife, on the death of *S. Hosken*, entered upon and became possessed of the estate and interest devised as aforesaid to the said *Nancy*,

as

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as in the right of the said *Nancy*; and on the 25th day of *November*, 1815, on the expiration of a former lease of the same premises, bearing date *December* 24. 1750, demised the premises in question, by indenture, to the Defendant. By the lease of 1750, the premises were, for a sum paid in hand, a yearly rent of 16*s*. 8*d*., and a sum of 40*s*. for a heriot or farliffe on the death of each of the *cestui que vies*, demised to *L. T.* for 99 years, if *R. T.*, *A. T.*, and *J. T.*, or either of them, should so long live, with a covenant from *L. T.* to keep the premises in repair; and a proviso, that if the yearly rent of 16*s*. 8*d*. should be in arrear, one month after the day of payment, and, being lawfully demanded, should not be paid, and there should be no sufficient distress on the premises, the lessor might re-enter. Warranty from the lessor for quiet enjoyment.

With the exception of the names of the parties and *cestui que vies*, and the amount of the sum paid in hand, the lease of 1815 was the same as the lease of 1750, neither of them containing any clause of re-entry for non-payment of the heriot service.

The said *Nancy Gilbert* died the 8th day of *April*, 1818, without issue surviving her. The premises in question were afterwards duly conveyed from the persons entitled in remainder, under the will of the said *W. Pennington*, to the lessor of the plaintiff.

The question for the opinion of the Court was, whether the lease made by *W. R. Gilbert* and *Nancy* his wife, to the Defendant, dated *November* 25. 1815, was or was not conformable to the leasing power contained in the will of the said *W. Pennington*.

If the Court should be of opinion that the said lease was so conformable, then the nonsuit was to stand; if not, then the nonsuit was to be set aside, and a verdict entered for the Plaintiff.

Pell

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Pell Serjt., for the lessor of the Plaintiff. The devisor has granted a power to the devisees to demise land, which he describes in two classes, *viz.* first, land then in lease for terms of years, determinable on lives; secondly, the residue of the premises; specifying the terms under which each classs shall be disposed of; and then adding, that no *such* demise shall be made without a condition of re-entry or non-payment of rent or services. Now the word demise, or any equivalent for it, does not recur between the expression *to demise the same premises in manner following* (which precedes the specification of the two classes of land) and the word *such*, which immediately follows the specification of the two classes and of the terms under which each shall be disposed of, so that the word *such* necessarily refers to demises of both the classes of land, and the conditions which follow that word are equally imposed on demises of each. If the devisor had intended to confine those conditions to demises of the second class of land, he would have added, after the word *such*, the word *last-mentioned.* Besides, there was as much reason why he should desire the redress of re-entry for the non-reddition of services on the first class as on the second class of leases. If this construction of the power contained in the will be correct, the lease of 1815 is void, not being conformable to that clause of the power which requires a re-entry for non-payment of 40*s.* in lieu of a heriot.

Lens Serjt., for the Defendant. The word *such* cannot, in grammatical or legal construction, be thrown back to apply to leases of the first class of land. The devisor, by describing the land in two classes, and specifying, before he comes to the second class, the terms on which the first class shall be demised, has pointed out all that he wished in regard to that class: he has said, in effect, " The first class is already in lease, on terms

with

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with which I am acquainted and satisfied; and, therefore, I wish those terms to be observed in future. But with respect to the second class, not now in lease, as there is no precedent of mine which the devisees can follow, I specify the terms in detail." Further, if the terms so detailed for the second class were inserted in a lease for the first class, the first class would not (as the devisor desires) be demised for the like terms, in like manner, and under the like rents, services, and conditions, as the same had been usually granted, there being in the lease of 1750 no clause of re-entry for non-payment of the 40*s.* in lieu of a heriot.

Pell was heard in reply.

DALLAS C. J. It has been agreed, by the counsel on both sides, that this is a mere question of construction, not to be governed by any other case, and, therefore, not touching the decision of any other case; and with respect to this construction, I feel no difficulty in deciding, that the word *such*, employed in the will, must be confined to the latter class of leases, and cannot be thrown back to the class first described. The thing to be looked to is the expression of the testator in the will, and he there distinguishes two sorts of property, that which has been usually let for any term of years determinable upon lives, (and with the mode of letting which, he appears to have been satisfied,) and that which he has directed to be let in a different way in future. The words of the power authorise the devisees "to demise, in the manner following, such parts of the premises as had been usually granted or demised;" referring, therefore, expressly to lands which had been usually demised, and fixing them still further by the words "or were then in lease." If the testator had intended that any alteration should be made in the leases of such lands, he would

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would have described the nature of such alterations; but instead of this, he says, they shall be let in like manner and for the like terms as they were let before: and the lease of 1815 does follow, in every particular, the lease of 1750. Why then should the word *such* be thrown back to govern the leases of the class of lands first described, when there is a subsequent class to which it immediately applies? In grammatical construction, it ought not to be so thrown back; ought it in reason? I think it ought not; the testator having described the first class of lands already in lease, and having provided that the future leases of those lands shall be of the same description as the leases then in existence, goes on to give directions for leases of the residue of the premises, requiring that such leases shall be framed after a particular form, which differs from that of which he had before spoken, and could not be applied to the first class of land, consistently with the testator's directions, that that class should be let on the same terms as it had been letten before.

PARK J. Two distinct subject-matters are included in this devise and power. The testator states that he has land of two descriptions; first, land which had been usually let, and was then in lease; and, secondly, the residue of his property: he then proceeds to direct that the first shall be let for the like terms, in like manner, and under the like rents, services, and conditions, as the same had been usually granted; and the residue, (which he treats as a distinct subject-matter) according to the special directions there set forth.

BURROUGH J. I have no doubt as to the meaning of this power; the words at the conclusion of the first branch of the power, (that the lands therein described shall be let for the like terms and in like manner as the

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same had been usually granted) are so emphatic as to render the testator's intention perfectly clear.

Richardson J. The objection to the lease of 1815 is, that it does not contain any power of re-entry for the non-payment of 40*s*. in lieu of a heriot, which it is contended it ought to have contained, on the ground that the word *such*, in the will, applies to leases of both descriptions of the land devised. I am of opinion, that the word *such* applies only to leases of the land last described; for, if a power of re-entry for non-payment of the 40*s*., in lieu of a heriot, had been inserted in leases of the land first described, that land would not, in such case, be let, as the testator requires it should be, for the like terms, in like manner, and under the like rents, services, and conditions, as it had been usually granted.

Judgment of nonsuit.

June 25.

Streeter *v.* Horlock.

Where an order is given, previously to the delivery of goods to a bailee, to deal with them, when delivered, in a particular manner, to which he assents, and afterwards the goods are delivered to him, a duty arises on his part, on the receipt of the goods, to deal with them according to the order previously given and assented to; and the law infers an implied promise by him to perform such duty: Held, therefore, that an allegation, "that in consideration, Plaintiffs at the request of Defendant, *had* caused to be shipped on board of the Defendant's vessel a quantity of wheat, to be carried safely to *W. T.*, for freight to be therefore paid, Defendant undertook to carry safely," — was supported by evidence of the Defendant's having admitted an undertaking to carry, though it appeared that all the wheat was not put on board till the day after such admission.

A VERDICT having been found for the Plaintiff in this cause, at the last *Essex* assizes before *Wood* B.,

Onslow Serjt., in *Easter* term, obtained a rule *nisi* for setting aside such verdict and entering a nonsuit, on

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the ground of a discrepancy between the contract set forth in the declaration and the evidence adduced in support of it.

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Taddy Serjt. having been heard against the rule, and *Onslow* for it, the following judgment was now delivered, which includes all the facts essential to the decision of the Court.

PARK J. This was an action of *assumpsit* brought against a carrier for not delivering goods according to contract. The question for the decision of the Court is, whether the evidence adduced at the trial is sufficient to support the third count of the declaration.

This count, after stating that the Defendant was a carrier of goods in a certain vessel, proceeding from the parish of *St. Lawrence* in *Essex* to divers other places for freight and reward, proceeds to allege, that heretofore, to wit, on the 15th day of *September*, 1821, at the parish aforesaid, in consideration that the Plaintiff, at the special instance and request of the Defendant, had caused to be shipped in and on board of the Defendant's vessel a large quantity of wheat of great value, to be carried and conveyed therein by the Defendant from the parish aforesaid to *West Thurrock* mill, on or before *Monday* then next, at and for reasonable freight and reward, to be paid to the Defendant in that behalf, the Defendant undertook that he would safely carry the said wheat from the parish aforesaid to *West Thurrock* mill aforesaid, and there deliver the same for the Plaintiff, on *Monday* the 17th day of *September*, in the year aforesaid.

At the trial it appeared, that on *Friday* the 14th of *September*, another person applied to the Defendant to carry certain goods for him on the ensuing *Monday*, which the Defendant declined, saying, "he had en-

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gaged to deliver 50 quarters of wheat for the Plaintiff on the *Monday*, at *West Thurrock* mill." Another witness proved, that he carted the Plaintiff's wheat to the Defendant's barge, lying at *St. Lawrence*, and gave the Defendant's son a note, and told him to deliver the wheat at *West Thurrock* mill on the *Monday*; and that all the wheat was delivered to the Defendant before nine o'clock on the *Saturday* morning. It did not distinctly appear at what particular period of the transaction it was that this witness gave the order to deliver the wheat at *West Thurrock* mill on the *Monday*; but probably it was given before the whole of the wheat had been shipped on board the vessel.

On this evidence, the objection made on the part of the Defendant was, that the third count states a promise made upon a past consideration, *viz.* in consideration that the Plaintiff *had caused* to be shipped, &c.; whereas it appears by the evidence, that the Defendant had entered into an engagement to deliver the Plaintiff's wheat at *West Thurrock* mill, before the wheat, or at least before the whole of the wheat, had been actually shipped; and therefore it was argued, that the count ought to have stated the consideration for the promise, in an executory form, *viz.* that the Plaintiff *would cause* to be shipped, &c.

But we are of opinion, that the count may be supported in its present form; and that, whenever, as in this case, an order is given previously to the delivery of goods to a carrier or other bailee, to deal with them when delivered, in a particular manner, to which he assents, and afterwards the goods are delivered to him accordingly, a duty arises on his part, upon the receipt by him of the goods, to deal with them according to the order previously given and assented to; and the law infers an implied promise by him to perform such duty. In the present case, the promise might have been

been stated as a promise by the Defendant, "to do his duty in that behalf," which would only have been a more concise mode of stating that which is in effect stated in this count.

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Many instances might be put in which the language of pleading in cases of contract is founded on this principle. Whenever the duty of the Defendant, arising upon the execution of the consideration, is simply to pay money, the usual and safest mode of pleading is to declare in *indebitatus assumpsit*; as in the cases of goods sold, work and labour done, and other cases. In *Clarke* v. *Gray and Others* (a), it is observed by Lord *Ellenborough*, that there is a great variety of agreements not under seal containing detailed provisions regulating prices of labour, rates of hire, times and manner of performance, &c. which are every day declared upon in the general form of a count for work and labour; and his Lordship instances contracts of affreightment in the nature of charter-parties, builders' contracts, and the like. This mode of declaring shews, that the established course is to charge the Defendant, not upon the original contract entered into by him at the time of signing the agreement, but upon the implied promise resulting from the execution of the consideration in his favour. So in actions brought by the payee against the drawer of a bill of exchange, the contract actually made by the Defendant is made by signing his name to the bill, and delivering the bill to the payee; and this might perhaps be considered as importing a prospective promise on his part to pay the amount of the bill, in the event of due presentment, dishonour, and notice, yet it is the constant course to state in the declaration the drawing and delivery of the bill, and then to charge the Defendant on an implied promise supposed to be made by him afterwards, in consideration of his liability arising upon these past events.

(a) 6 *East*, 569.

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Other cases might be put; but enough has been said to illustrate the principle.

On the whole, we are of opinion, that the third count of the declaration is supported by the evidence; and, therefore, that the rule for entering a nonsuit must be discharged.

Rule discharged.

June 25.

GRAVENOR v. WOODHOUSE, and THOMAS and Wife.

1. Avowries, first, by *W.* and *T.* for rent due to *W.* and *T.* from Plaintiff, as tenant to *W.* and *T.*; secondly, by *W.* and *T.*, and his wife, in right of his wife, for rent due to *W.* and *T.* and his wife, in right of his wife, from Plaintiff, as tenant to *W.* and *T.* and his wife, in right of his wife; were holden to be supported by evidence of an attornment from Plaintiff to *W.* and *T.* and his wife.

2. The avowants proved an attornment made by the Plaintiff, after ejectment brought against him seven years before the commencement of the replevin suit, during which seven years it did not appear that rent had been demanded.

The Plaintiff offered to prove a feoffment to himself by the person under whom the avowants claimed, and certain letters from that person containing expressions adverse to the avowants' claim; which evidence having been rejected, on the ground that the Plaintiff could not be permitted to dispute his tenancy after an attornment, the Court granted a new trial.

REPLEVIN. Avowries, first, by *Woodhouse* and *Thomas*, for seven years' rent, due to *Woodhouse* and *Thomas* from the Plaintiff, as tenant to *Woodhouse* and *Thomas*; secondly, by *Woodhouse* and *Thomas* for seven years' rent due to *Woodhouse* and *Thomas* from the Plaintiff, as tenant of the premises, under a demise made to him at the yearly rent of 70*l.*; thirdly, by *Woodhouse* and *Thomas* and wife, in right of his wife, for seven years' rent due to *Woodhouse*, and *Thomas* and his wife, in right of his wife, from the Plaintiff, as tenant to *Woodhouse*, and *Thomas* and his wife, in right of his wife; fourthly, by *Woodhouse*, and *Thomas* and his wife, in their own right, for seven years' rent, due to *Woodhouse*, and *Thomas* and his wife, from the Plaintiff, as

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tenant to *Woodhouse*, and *Thomas* and his wife, in right of his wife.

Pleas to each of the avowries, *non tenuit* and *riens* in arrear; and issue thereon.

At the trial, before *Garrow* B., last *Hereford* assizes, the Defendants put in the following attornment:

"Between *John Goodtitle*, on the demise of *Edward Woodhouse*, *James Thomas*, and *Anne* his wife - - - - - - - Plaintiffs;

and

Richard Notitle - - - Defendant.

"I, *Peter Gravenor*, the tenant in possession of the premises in question in this cause, do hereby attorn and become tenant to the lessors of the Plaintiff, *Edward Woodhouse*, *James Thomas*, and *Anne* his wife, of and for all that messuage, farm, and lands, called the *Parks*, situate in the parishes of *Binghill*, *Wellington*, and *Canon Pyon*, in the county of *Hereford*, from the 2d day of *February* instant, for one year, and so from year to year, at the yearly rent of 70*l.*; subject and without prejudice to any right or claim I may have in equity in the said estate as against the said lessors, or the devisees, legatees, or executors of *James Woodhouse*, Esq. deceased. As witness my hand, this 9th day of *February*, 1814.

"Witness, *J. Hawkins*. *Peter Gravenor*."

It was objected, on the part of the Plaintiff, that the language of the avowries was not sustained by the attornment, and evidence was offered of a feoffment made to the Plaintiff by a person under whom the Defendants claimed, and of certain letters from that person containing expressions which were said to be adverse to the Defendants' claim, but the learned Judge thought the avowries borne out by the language of the attornment, and rejected the evidence of the feoffment and of the letters, on the ground that the Plaintiff ought not to be permitted to dispute his tenancy after having made

the

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the above attornment. A verdict was, therefore, found for the Defendants for the whole seven years' rent, none of which appeared to have been demanded before the occasion on which this action was brought; but it was said the parties had been a long time in chancery.

Hullock Serjt., in *Easter* term, moved for a rule to shew cause why a new trial should not be granted, on the grounds, first, that the avowries were not supported by the attornment, inasmuch as consistently with the terms of that attornment, *Thomas*, in addition to his interest in right of his wife, might have had a separate interest of his own; and, secondly, that the evidence proposed by the Defendants had been improperly rejected.

Lens Serjt., who shewed cause against the rule, contended, that an attornment to husband and wife would create a tenancy to the husband, in the same manner as on a demise by husband and wife a covenant to both was in legal effect a covenant to the husband. *Arnold* v. *Revoult*. (*a*) So that the legal effect of the attornment was properly described in the second avowry. *Parry* v. *Hindle* (*b*), *Walsal* v. *Heath* (*c*), *Nooth* v. *Wyard*. (*d*) But, with the addition of the third and fourth avowries, the tenancy was stated in every shape in which it could arise on the attornment. On the second point, he argued, that it was an acknowledged principle, that a party who has consented to become tenant cannot afterwards dispute his lessor's title. *Syllivan* v. *Stradling* (*e*), *Parry* v. *House* (*f*); unless it has expired, *England dem. Syburn* v. *Slade*. (*g*)

(*a*) 1 *B. & B.* 443.
(*b*) 2 *Taunt.* 180.
(*c*) *Cro. Eliz.* 656.
(*d*) 2 *Bulstr.* 233. 1 *Roll. Rep.* 52.
(*e*) 2 *Wils.* 208.
(*f*) 1 *Holt*, N. P. C. 489.
(*g*) 4 *T. R.* 682.

Hullock

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Hullock Serjt., in support of the rule, upon the intimation of a strong opinion by the Court, abandoned the objection to the avowries; but, with respect to the attornment, argued, that it was not conclusive evidence of a tenancy, but only a bare assent, which would not pass any interest or make a bad grant good, or work by way of estoppel (*Sheppard's Touchstone*, 254.); and that, therefore, the evidence to rebut the bare presumption arising out of the attornment was improperly rejected. In *Rogers* v. *Pitcher* (*a*) it was decided, that even payment of rent is not conclusive evidence of a tenancy.

Cur. adv. vult.

PARK J. This case comes before the Court upon a motion for a new trial; it was an action of replevin. The Defendants avowed the taking for seven years' rent in arrear, at 70*l.* *per annum*, from the 2d *February*, 1814, due to *Edward Woodhouse*, *James Thomas*, and *Anne* his wife, in right of the said *Anne*.

To support the Defendants' avowry, they put in an attornment by the Plaintiff.

It was objected at the trial, and the objection was again renewed on the motion, that this instrument to *Edward Woodhouse*, *James Thomas*, and *Anne* his wife, did not support any of the present avowries, which stated the title of *James Thomas* to be in right of his wife; but on the argument we thought there was nothing in this objection, and it was very properly and candidly abandoned by the learned counsel for the Plaintiff: but the second objection to the Defendants' title is of more weighty consideration. The Defendants had made out a *primâ facie* case; but it appears by the note of my learned Brother who tried the cause, that some evidence was offered of letters, and a feoffment from *James Wood-*

(*a*) 6 *Taunt.* 202. 1 *Marsh.* 541.

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house (the testator of the Defendants) to the Plaintiff, *Gravenor*.

This evidence was not received, and, indeed, it does not very distinctly appear of what nature it was; but the question is, is there not on the case itself sufficient to warrant the Court in at least sending it for further inquiry?

Of the general rule of law, that a tenant shall not be allowed to question the title of his landlord where he has originally received possession from him and has paid him rent, there is no doubt, ever since the case of *Syllivan* v. *Stradling*. It always furnishes a strong *primâ facie* case: but to the generality of this rule there are exceptions; for, although on the one hand the general rule is most wise and politic, in not allowing a tenant lightly to use to his landlord's detriment that title the possession of which he has entrusted to him, so on the other it is most just so far to guard the tenant, that he may not be carelessly put into the hazardous situation of paying his rent twice over, and being put to the trouble and expense of an action to recover that which he may have been compelled to pay.

The supposed generality of the rule has been departed from in many cases; for instance, in *England dem. Syburn* v. *Slade*, Lord *Kenyon* and the Court of King's Bench, confirming an opinion of *Gould* J., held, that it was competent for the tenant to shew that his landlord's title had expired, and that he had now no right to turn him the tenant out of possession.

In *Doe dem. Jackson* v. *Ramsbottom* (a) it was again held, that it was competent for the tenant to shew that his landlord's title had expired; and *Bayley* J. appears to have relied on the case of *England dem. Syburn* v. *Slade*, just quoted by me.

(a) 3 *M. & S.* 516.

Payment

Payment of rent, in all cases, furnishes a strong presumption against the tenant, and it is always a good *primâ facie* case for the landlord: but that is also open to explanation; for, where it has been paid under a misrepresentation, the tenant is not estopped from resisting further payment, after discovery of the mistake.

This was held by the Court of Common Pleas, in the case of *Rogers* v. *Pitcher*.

Gibbs C. J. in that case says, — "the Defendant contends, that because he has induced the Plaintiff to pay rent to him once or twice, in ignorance too of the facts, she is bound to pay it to him for ever; though she is also bound to pay it to Mrs. *Baker*. Justice speaks very forcibly against such a position; but if we found any law by which a person having paid rent on one occasion was ever after bound by that payment, we must decide accordingly: but there is no such law."

A variety of cases might be put in which a tenant would be excused from payment of rent to a person not really entitled to it, but I forbear to trouble the Court with any more. The question, then, is, whether in this case there is any reason for an exception to the admitted general rule.

We think that there is. Without forming any judgment *à priori* about the admissibility of this or that particular piece of evidence, with which at present we have nothing to do, we are of opinion there is a sufficient degree of suspicion resting upon the case to induce us to require further investigation.

As far as one can judge from the attornment (which it appears was not quite voluntary on the part of *Gravenor*, but to prevent the operation of an ejectment), it should seem that *Gravenor* had been in possession before any title had *in fact* come to Defendants; so that he does not appear originally to have come in under them, though he did, probably, under him from

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from whom the Defendants claim. In the next place, the attornment is dated the 9th *February*, 1814, and rent is to run from the 2d *February* preceding. The rent is pretty considerable, *viz.* 70*l.* *per annum;* and yet, from the date of the attornment for seven years, not one farthing of this rent, large as it is, is ever demanded or paid; this is of itself a circumstance of strong suspicion. One may conjecture that the Defendants had some very cogent reason for procuring an attornment at that particular time, and never acting upon it for so long a period afterwards. At all events, though all this may receive satisfactory explanation, we think it ought to be submitted to some further inquiry.

It was said that these parties have been long litigating in Chancery, and that that may be a reason why no rent has been demanded.

It does indeed appear by the case of *Woodhouse* v. *Meredith* (*a*), that there has been much litigation, and the circumstances appearing in that printed report tend rather to excite than to allay suspicion. We, however, wish to be understood to decide this case on the facts, and the surmises fairly arising out of those facts, as they present themselves in the report of the case as tried at *Hereford*. The rule for a new trial must therefore be made absolute.

I need hardly add, except for form, that from my delivering this judgment, it is clear that my Lord Chief Justice, who was not present at the argument, has taken no part in these deliberations.

Rule absolute.

(*a*) 1 *Jacob & Walker*, 204.

HARRISON *v.* VALLANCE.

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1. In trover for a deed which the Defendant had, by letter, admitted he detained at the request of *W. R.*, and in the detainer of which *W. R.* was substantially interested, Held, that declarations of *W. R.*, in favour of the Plantiff's claim, were properly received in evidence, and that *W. R.* was properly rejected.

2. Held, that a description of the deed in the declaration, as, "a certain deed of assignment, bearing date, &c., purporting to be made between *T. S.* of the one part, and *W. R.* of the other part, and purporting to be a conveyance from *T. S.* to *W. R.* of certain tenements therein mentioned, by *T. S.* to *W. R.* for the remainder of a term therein mentioned, and yet unexpired," was borne out in evidence by a conveyance of the premises by lease and re-lease between the same parties, and under the same date.

TROVER for a deed which was described in the declaration, as "a certain deed of assignment, bearing date a certain day in that behalf mentioned, purporting to be made between *Thomas Smith* of *Church-yard Row, Newington*, of the one part, and *William Reeve* of *Brighton*, of the other part, and purporting to be a conveyance from the said *Thomas Smith* to the said *William Reeve* of certain tenements therein mentioned by the said *Thomas Smith* to the said *William Reeve*, for the remainder of a certain term therein also mentioned and yet unexpired."

At the trial before *Dallas* C. J., *London* sittings after *Easter* term, it appeared, that the Plaintiff had been employed by *Reeve* to obtain from *Smith* this and other deeds, (which *Smith*, on the ground of some unsatisfied claim, had withholden from *Reeve*,) and for the performance of such service the Plaintiff was to receive a remuneration from *Reeve*. The Plaintiff having, on the payment of 150*l.*, obtained from *Smith* the deed in question, placed it, at the request of *Reeve*, in the hands of the Defendant, who was engaged in a treaty to advance money to *Reeve*. The Defendant, thereupon, gave the Plaintiff the following acknowledgment:

"I hereby acknowledge receiving of Mr. *Harrison* a deed between *Thomas Smith*, of *Church-yard Row*,

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Newington, and *William Reeve* of *Brighton*, dated the 22d day of *November*, 1821. The above deed I hold in trust for certain purposes.

"*John Vallance.*"

The deed, when produced, proved to be, not an assignment, but a conveyance by lease and release; upon which it was urged, that the statement in the declaration was a misdescription, and that the Plaintiff ought to be nonsuited. The objection was overruled, the point being reserved.

Evidence was then offered by the Plaintiff, of declarations by *Reeve* that he was indebted to the Plaintiff for his services in this matter; and a letter was produced from the Defendant to the Plaintiff, which contained the following passages: "I received the writings under the agreement, that if I and my partner should choose to advance the 150*l.* you refer to upon them, we were to have a mortgage upon the property; but, that if we did not choose to advance any more money than we have already advanced, I was to give them up again. When I saw my partner, we decided that we would not advance any more; of this, I immediately informed *Reeve*, stating also, that I was ready to give the writings up: instead, however, of either himself taking them, or desiring they might be returned to you, he desired I would keep them. Holding the writings can do me no good, and I am perfectly willing to give them up when *Reeve* wishes it."

The reception of this evidence was opposed, on the ground that *Reeve* himself ought to have been called, and he was called on the part of the Defendant; but the declarations and the Defendant's letter were received, and *Reeve* himself was rejected, on the ground, that he was the party substantially interested in the cause: this point also being reserved.

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A verdict having been found for the Plaintiff,

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Taddy Serjt. this term obtained a rule *nisi* to enter a nonsuit, or to have a new trial; and, in support of his rule, contended, as to the first point, that the words "*of assignment*" forming part of an intelligible sentence in the declaration, could not be rejected as surplusage; but, as applied to the deed produced in evidence, were an obvious misdescription.

The Court, however, thought the deed was sufficiently described by the words "purporting to be a conveyance from the said *Thomas Smith* to the said *William Reeve.*"

Taddy then urged, that the declarations of *Reeve* ought not to have been received, but that *Reeve* himself should have been called as a witness, arguing that the rule against the admission of interested witnesses had never gone farther than to exclude those against whom the verdict would be evidence on another occasion, or who would be liable to the costs of the action; that as *Reeve* did not stand in this situation, he ought to have been admitted and his declarations excluded; and that if it were otherwise, a Plaintiff by suing the agent instead of the principal, might succeed in excluding the evidence of both, in every thing that was material to the defence.

But the Court, referring to the cases collected in pp. 93, 94. *Phillipps on Evidence*, 4th ed.

Discharged the rule.

Vaughan Serjt. shewed cause against the rule.

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CHRISTIE v. WALKER and Four Others.

1. On the 4th of *May* Plaintiff sued out bailable process, returnable in one month of *Easter*, against *W.*, in which *W.* only was named, and on which *W.* was arrested, and put in and perfected bail in *Easter* term.
On the 11th of *May* Plaintiff sued out serviceable process, (in which four other Defendants were named, but not *W.*) returnable on the morrow of the *Ascension*: afterwards, a declaration as of *Trinity* term, was delivered against *W.*, together with the other four Defendants:
Held, that the declaration was not irregular.
2. Process may be bailable against some, and serviceable against others, of several Defendants.
3. Where an action is brought against more than four Defendants, and two writs are sued out, it is not necessary, except with a view to fixing bail, to name all the Defendants in each writ.
4. *Semble*, that if either of the writs are bailable, all the Defendants should, with a view to fixing bail, be named in the *ac etiam* clause of the bailable writ, in C. P.

ON the fourth of *May* last, the Plaintiff sued out a bailable *capias*, (in which *Walker* only was named) returnable in one month of *Easter*; upon this writ, *Walker* was arrested, and duly put in and perfected bail above, in *Easter* term last.

On the 11th of *May*, the Plaintiff sued out a serviceable *capias*, (in which the other four Defendants were named, and not *Walker*) returnable on the morrow of the *Ascension*.

On the 10th of *June*, a declaration as of the present *Trinity* term was delivered against *Walker*, together with the other four Defendants; and on the 15th a plea was demanded.

Hullock Serjt. had obtained a rule *nisi*, on the part of the Defendant, *Walker*, for setting aside the declaration as irregular, on the ground that *Walker* having been arrested on a separate writ, in which the other Defendants were not named, the declaration, in which all five were named, must, as against *Walker*, be deemed a declaration *by the bye*; in which case it was irregular, as a declaration *by the bye* can only be regularly delivered after the delivery of a declaration in chief. He

contended,

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contended, that with a view to the Plaintiff's present cause of action, the processes were irregular; that both ought to have been bailable, or both serviceable, and that the names of all the five Defendants ought to have been inserted in each writ, if, indeed, it was necessary at all, that the Plaintiff should sue out two writs, which was far from being clear, inasmuch as the rule against including more than four Defendants in one writ, seemed to apply only to separate causes of action, the rule having been made in consequence of a practice formerly in use, of putting into one writ a number of Defendants for separate causes of action, with a view to avoid the necessity of an additional stamp. The five Defendants not being named in the writ on which *Walker* was arrested, there was such a variance between the writ and the declaration, as would entitle the bail to an *exoneretur* on the bail bond.

Vaughan Serjt., who shewed cause against the rule, insisted that four Defendants only could be joined in one writ; and cited *Turner* v. *Portall* (a), in which bailable and serviceable process had been employed against different Defendants. As to the time of delivering the declaration, the Plaintiff could not declare in chief till all the Defendants were in court.

The *Court*, after hearing *Hullock* in support of his rule, thought, that as the only object of process was to bring Defendants into court, the declaration was not irregular because process had been sued out bailable against some, and serviceable against others of the Defendants in the same action, or, because all the five Defendants had not been named in each writ. As to

(a) 2 *N. R.* 231.

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the time of declaring, the Plaintiff was not bound to declare in chief before the return of the writs against all the Defendants.

Rule discharged.

June 19.

MACKINTOSH and Others v. BARBER, GARRATT, and Others.

A., by will, directed his real and personal estate to be sold, the produce to be invested in the public funds in the names of trustees, for his son and daughter, and two others. Directions were given as to succession in cases of death without issue; and if all the legatees should die under age, and without issue, the property was to go over to *B.*, *C.*, *D.*, and *E.*, and their heirs; "which four persons *A* appointed as his executors, to see that every thing was duly performed according to his will;" he also appointed *F.* and *G.* as executors, "in addition to the above persons, for which he requested those two friends would accept of 50*l.* each;" he also requested *F.* and *G.* to act as guardians, in conjunction with *B.*, *C.*, *D.*, and *E.*, for the care of the persons and property of the legatees. The will was duly attested, but there was an unattested codicil, that if either of the executors should refuse to accept the trust and act as executor, the bequest of property to every such person was totally annulled.

The testator died, and the will was proved by *B.*, *C.*, and *D.* only, *E.*, *F.*, and *G.* having renounced.

Part of the real estate having been put up to sale in four lots, was purchased by *G.*, who afterwards refusing to complete his purchase, a suit was instituted in Chancery. That court decreed that the codicil was not to be considered as part of the will with reference to the real estate, but that the rest of the will ought to be established, and the trusts performed; and upon reference to the Master, it was found that the contract of purchase entered into by *G.* was for the benefit of the legatees, (who were infants).

Lot 1. was then conveyed by lease and appointment and re-lease from *B.*, *C.*, *D.*, *E.*, *F.*, and *G.* to *T.*, in consideration of 2000*l.* Lot 2., by lease and appointment, and re-lease, from *B.*, *C.*, and *D.* to *T.* for 2300*l.*, (*T.* declaring by another deed, that the consideration-money, mentioned in the two first deeds, belonged to *G.*; that the name of *T.* was only used as a trustee, and that *T.* stood seised of the premises in trust for *G.*) Lot 3., by lease and appointment, and re-lease, from *B.*, *C*, and *D.* to *G.*, to the use of *G.* for 4000*l.* Lot 4., by lease and appointment, and re-lease, from *B.*, *C.*, *D*, *E.*, *F.*, and *G.* to *G.*, to the use of *G.* for 360*l.*: Held, that by these conveyances the legal estate in lots 1. and 2. was well vested in *T.*, and the legal estate in lots 3 and 4. in *G.*

THE following case was sent by the *Vice-Chancellor* for the opinion of this Court. *John Mackintosh* devised his estate, called *Piggotts* manor farm, in the parish

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parish of *Aldenham*, in the county of *Herts*, with all timber, live and dead stock, utensils of husbandry, &c.; also all his household furniture, plate, linen, wine, wearing apparel, and every other thing which might be upon the said premises at the time of his death, to be sold as soon after his decease as possible and convenient, in such manner as might be productive of the greatest value: after directing the payment of all his just debts, and of a legacy to *Thomas Shears*, he bequeathed unto his son *John Mackintosh*, his daughter *Eliza Jane Mackintosh*, *Mary Ann Shears*, and *Martha Shears*, the whole residue of his property of every description and kind, to be divided betwixt them in separate and equal proportions, subject to certain directions contained in the will, by which all the property was ordered to be invested in the public funds, in the names of trustees to be appointed by the executors; and arrangements were made touching succession, in case of the death of any of the legatees under age; among which arrangements, one was, that if all the legatees should die without issue, before they arrived at 21 years of age, then the property bequeathed to them, was to devolve to and become the property of Mr. *Joseph Barber*, Mr. *John Slapp*, Mr. *Frederic Grigg*, and Mr. *George Capper*, to be divided betwixt them in equal proportions, and to their heirs for ever; which last mentioned four persons, the testator appointed as his executors, to see that every thing was duly executed and performed according to his will and desire, in his will expressed; he also appointed Mr. *Francis Garratt*, and Mr. *John Garratt*, as executors in addition to the above persons, for which he requested those two friends would accept of fifty pounds each. He also requested, that Messrs. *Francis* and *John Garratt* would act as guardians in conjunction with Mr. *Capper*, Mr. *Barber*, Mr. *Grigg* and Mr. *Slapp*, for the care of the persons and property of his son *John*, *Eliza Jane Mackintosh*, and *Mary*

 Ann,

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Ann, and *Martha Shears*. The testator almost immediately afterwards, added an unattested codicil to his will in the words following. "It must be understood that it is my will and intention, that if either or more than one of my executors shall refuse to accept the trust and act as executor according to the directions given in my will, then I annul totally my bequest of any property to every such person who shall so refuse to take the trust upon himself." *J. Mackintosh*. The will was proved in the Prerogative Court of *Canterbury*, on the 22d *June*, 1818, with the codicil, by *Joseph Barber*, *John Slapp*, and *Frederic Grigg*, three of the executors, *George Capper*, *Francis Garratt*, and *John Garratt*, having first renounced the probate and execution thereof.

The Defendants, *Barber*, *Slapp*, and *Grigg*, who proved the will, in the execution of the trusts thereof, caused the testator's estate, called *Piggotts* manor farm, to be put up to sale by public auction, on the 3d *July* 1818, in four lots;

The Defendant, *John Garratt*, one of the executors and trustees named in the will, but who had renounced the execution thereof, attended at the sale, and was declared the highest bidder for and purchaser of all the lots, and signed a contract accordingly.

The Defendant, *John Garratt*, having so become the purchaser of the said estates, afterwards declined completing his purchase, on the ground, that although the acting executors might sell the estate without the concurrence of those who had renounced, yet that they could not sell to either of those who had renounced; and thereupon a suit in Chancery was instituted.

By the decree pronounced by that Court on the hearing of the cause, it was declared, "that the memorandum at the foot of the will of the testator, was not to be considered as part of the will with reference to the testator's real estate, but the Court declared that the rest of the testator's will ought to be established,

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and the trusts thereof performed and carried into execution, and ordered and decreed the same accordingly." And it was also ordered by the Court, that it should be referred to one of the masters, to inquire and state to the Court, whether it would be for the benefit of the Plaintiffs, the infants, and the other persons interested in the testator's estate, that the contract entered into and signed by the Defendant, *John Garratt*, for the purchase of the testator's estate, should be completed and carried into execution. The master afterwards certified, "that it would be for the benefit of the said Plaintiffs, the infants, and the other persons interested in the testator's estate, that the contract entered into and signed by the Defendant, *John Garratt*, for the purchase of the said testator's estate, called *Piggotts* manor farm, should be completed and carried into execution."

Accordingly, by indentures of lease and appointment and release duly executed, and bearing date respectively, the 1st and 2d of *January*, 1822, and made between *Joseph Barber*, *John Slapp*, *Frederic Grigg*, *George Capper*, *Francis Garratt* and *John Garratt*, of the one part, and *Peter Thompson* of the other part; *Joseph Barber*, *John Slapp*, *Frederic Grigg*, *George Capper*, *Francis Garratt* and *John Garratt*, for and in consideration of the sum of 2000*l.* to them in hand, paid by *Peter Thompson* at the time of the execution thereof, the receipt whereof they did thereby respectively acknowledge, did, and each of them did appoint, grant, release, and convey unto *Peter Thompson*, (in his actual possession, then being by virtue of a bargain and sale, &c.) and to his heirs, the lot No. 1., to hold the said *Peter Thompson*, his heirs and assigns, to and for the only proper use and behoof of the said *Peter Thompson*, his heirs and assigns for ever, with usual covenants from trustees, and receipt for consideration money indorsed and duly witnessed.

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And by other indentures of lease and appointment and release, bearing date the said 1st and 2d *January*, 1822, and made between *Joseph Barber*, *John Slapp*, and *Frederick Grigg*, on the one part, and *Peter Thompson* of the other part, *Joseph Barber*, *John Slapp*, and *Frederick Grigg*, in consideration of the sum of 2300*l.* to them in hand paid by *Peter Thompson*, at the time of the execution thereof, (the receipt whereof they did thereby acknowledge,) did appoint, grant, release, and convey unto the said *Peter Thompson*, (in his actual possession then being, by virtue of a lease for a year,) the lot No. 2., to hold, unto the said *Peter Thompson*, his heirs and assigns, for ever, with usual covenants from trustees, duly executed and attested, and receipt for consideration-money indorsed and duly witnessed.

By another deed, duly executed by *Peter Thompson*, he declares, that the purchase-monies mentioned in the last deeds were not his money, but that the whole thereof was the money of and belonged to the said *John Garratt*, and that the name of him, *Peter Thompson*, was made use of in the said deeds as a trustee only for *John Garratt*, and that he stood seised of the said estates and premises as a trustee for *John Garratt*, his heirs and assigns, and to be from time to time conveyed and disposed of as he or they should direct and appoint.

And by indentures of lease and appointment and release, bearing date the said 1st and 2d *January* 1822, and made between *Joseph Barber*, *John Slapp*, and *Frederick Grigg*, of the one part, and *John Garratt* of the other part, *Joseph Barber*, *John Slapp*, and *Frederic Grigg*, in consideration of the sum of 4000*l.* to them in hand paid by *John Garratt*, at the time of the execution, (the receipt whereof they did thereby acknowledge,) did appoint, grant, release, and convey unto the said *John Garratt*, in his actual possession then being, (by virtue

of

of a lease for a year,) the lot No. 3., to hold unto the said *John Garratt*, his heirs and assigns, to the use of him the said *John Garratt*, his heirs and assigns for ever, with usual covenants from trustees, duly executed, and receipt for consideration-money indorsed and duly witnessed.

By similar deeds all the six executors, in consideration of 360*l.* paid to them by the said *John Garratt*, did appoint and convey the lot No. 4., unto and to the use of the said *John Garratt*, his heirs and assigns for ever.

The question for the opinion of the Court was, whether the legal estate in fee of and in lots No. 1, 2, 3, and 4, parts of the estate in question in this cause, or any of them, is well vested in *Peter Thompson* and the Defendant, *John Garratt*, or either of them, by the conveyances made to them.

This case was argued, first, in *Easter* term last, and now for the second time.

Bosanquet and *Hullock*, Serjts. for the Plaintiffs. It being admitted that there is no fraud in this case, nor any breach of trust on which equity will interfere, the only question is, whether there exist strict legal objections against any or all of these conveyances. It seems clear that the executors had a power to sell, for the desire expressed by the testator is sufficient to create such a power. *Anon.* 2 *Leon.* 220.; *Bentham* v. *Wiltshire* (a); *Patton* v. *Randall.* (b). But it is objected to the second and third conveyances, that the acting executors named in a will cannot convey to one who has renounced; and, to the first and fourth conveyances, that an executor or trustee cannot convey to himself, it being assumed that

(a) 4 *Maddock*, 44. (b) *Sugd. on Powers*, 173. note, 3d. ed.

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the conveyance to *Thompson* is indirectly a conveyance to *Garratt*.

The objection to the second and third conveyances does not arise; for, in the sale of this estate, the executors did not act *quâ* executors having an interest, but in the exercise of a naked power, unaccompanied with any interest, there being no words in the will which invest them with any interest; so that in this, as in every case of the exercise of a naked power, [which is a mere modification of a use, *Goodill* v. *Brigham* (a),] the appointee takes under the original instrument creating the power, and not under the appointment itself; and there can be no objection to *Garratt*'s taking under the will, which creates the power in question.

Even admitting *Barber*, *Grigg*, and *Slapp*, to have acted in the sale as executors having an interest, it may fairly be contended, that the testator meant that those three and *Capper* should alone be concerned in the sale of the estate, and that the *Garratts* were afterwards named, rather as guardians to the children than as executors. At all events, though a party may be still deemed an executor, who renounces after being absolutely appointed by the will, yet this cannot be affirmed of a party, who, renouncing under a power of renunciation, given him by the words of the will itself, has in fact never been absolutely appointed executor. It is true, that if an executor, absolutely appointed by the will, renounces, he may, notwithstanding, afterwards take out probate, and act, but he cannot set aside acts done by the other executors without him; so that supposing *Garratt* to have been actually executor, and to have renounced under ordinary circumstances, still the statute 21 *H.* 8. *c.* 4., expressly legalizes a conveyance by the residue of the executors, where some or one of them refuses.

(a) 1 *B* & *P.* 196. *per Eyre* C. J.

The

The only authority to the contrary, is a passage in *Co. Lit.* 113. *a.*, where it is laid down, that if one refuses, the others cannot make sale to him that refused, because he is party and privy to the will, and remains executor still: but this passage rests on a case in *Bendloe* and *Dallison*, *p.* 15., said to have been decided in *Trinity*, 41 *Edw.* 3., which is reported in the same words in the book called *Old Bendloe*, *p.* 14., in *Keilway*, 207. *b.*, and in *Anderson*, 27. *Anderson*, however adds, "*Quære* the law after the said statute." So that the case is not entitled to much weight; and Lord *Kenyon* says (in *Withnell* v. *Gartham*) (*a*), "That the distinction respecting sales by the survivors, where power is given to persons by name, and when it is given by name of office, is founded on law, which was, perhaps, a little doubtful in its origin, and was the occasion of making the statute 21 *H.* 8. *c.* 4.; for it appears by the preamble, that that act was passed, rather to remove doubts than to make a new law; it recites, that such a sale of lands, *after the opinion of divers persons*, can in no wise be good or effectual in law." Further, the reason on which the case in *Bendloe* was decided, namely, that the renouncing executor is still a party, applies equally to cases before and after the statute, so that if that reason be not well founded, the second and third conveyances under the statute remain unimpeached.

This leads to the consideration of the objection to the first and fourth conveyances, which may be divided into two heads; first, that a party cannot convey to himself: secondly, that at all events, he cannot do so where he is an executor, such a conveyance being inconsistent with his duty as an executor. The first head of the objection is of a nature purely technical, and occasioned by the

(*a*) 6 *T. R.* 396.

ancient

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ancient forms of conveyances: as, with respect to a conveyance by bargain and sale; a man cannot bargain and sell to himself, because of the supposed absurdity of such a contract; for the same reason, he cannot enfeoff himself or his wife; but there is nothing in the common law which prohibits a conveyance by a party to himself, provided he can effect it consistently with the technical forms of conveyance. Thus a party may enfeoff another with the intent to take back the estate to himself, or to himself and his wife; so he may covenant to stand seised to the use of himself or his wife, or he may convey to the use of himself and his wife; the owner of an advowson may present himself; the donee of a general power of appointment may execute it in favour of himself; why, therefore, might not these executors execute in favour of themselves, or one of themselves, the power of appointing to a purchaser? or how in the absence of fraud can the conveyance by all of them to *Thompson* be impeached? If an appointment to a stranger can be set aside by proof in *pais* that the stranger takes for the appointor, no conveyance under a power can be safe.

Then, secondly, the principle that a trustee cannot be the purchaser of a trust estate, is a mere rule of equity; if proper forms be observed, the conveyance is good at law; and unless a trust has been abused, a Court of Equity will not set aside such a conveyance, *Campbell* v. *Walker* (a), *Sanders* v. *Walker*. (b) Even when equity has interfered on the ground, that a trust has been abused, it has always decreed a reconveyance, which would be unnecessary if the conveyance to the trustee were void; and, though such interpositions have taken place on applications against a trustee, there is no instance of an application by a trustee to set aside a conveyance made to himself. Here, the conveyance

(a) 5 *Ves.* 678. (b) 13 *Ves.* 603.

is for the benefit of the *cestuis que* trust, and the consequences of holding such a conveyance to be void, might in other cases be most injurious to subsequent *bonâ fide* purchasers.

Lens and *Vaughan* Serjts., for the Defendants, relied mainly on the passage in *Co. Lit.* 113. *a.*, and the case in *Bendloe*, which, they observed, was also stated as law in 1 *Roll. Abr.* 329., and had never been questioned in any subsequent decision. They contended, that no distinction could be made between the rights of an executor for the purpose of sale, and the rights of an executor for ordinary purposes, the law not recognizing two sorts of executors. So that, on these grounds, the second and third conveyances must be holden void.

With respect to the fourth, that *Garratt*, notwithstanding his renunciation, remained an executor for all legal purposes; *Robinson* v. *Pett* (*a*), *Middleton*'s case. (*b*) That the interests of an executor as a purchaser were so entirely opposed to his duty as a seller, that the Courts would never uphold a transaction, which, if decided to be legal, might be productive of the most ruinous consequences to infants and others, for whose benefit executors were entrusted with power. That where parties enfeoffed for the purpose of a re-enfeoffment to themselves, the conveyance was of their own estate, and not of the estate of a *cestui que* trust: and where a party presented himself under his own advowson, institution by the bishop, and induction, were necessary, before he could become possessed of the living. So that there was no ground for saying that the objection to the fourth conveyance was merely technical, or that such a conveyance could be supported under any view of the case.

(*a*) 3 *P. Wms.* 251. (*b*) 5 *Rep.* 28.

If

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If that conveyance was void, so was also the first, the object of that being exactly the same as the object of the fourth, and *quod prohibetur per directum prohibetur et per obliquum* (a); *Magdalen College* case (b); *Carmelite Friars'* case. (c) In *Jenkin's Centuries, p.* 189, it was holden, that executors could not retain land to pay debts, but were bound to sell to some one not an executor.

Cur. adv. vult.

The following certificate was afterwards sent: "This case has been argued before us by counsel; we have considered it, and are of opinion, that, under all the circumstances within stated, the legal estate in lots 1 and 2 is well vested in *Peter Thompson*, and the legal estate in lots 3 and 4 is well vested in the Defendant, *John Garratt*, by the conveyances made to them respectively.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

(a) *Co. Lit.* 223. *b. Wingate's Maxims*, 618.

(b) 11 *Rep.* 73.

(c) *Ibid. Wingate*, 619.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Michaelmas Term,

In the Third Year of the Reign of GEORGE IV.

1822.

PALMER and Others *v.* BLACKBURN. (*a*)

Nov. 8.

The general principle of insurance, that the insured shall, in case of a loss, recover no more than an indemnity, may be controlled by a mercantile usage clearly established to the contrary: and usage, that the loss in an open policy on freight shall be adjusted on the gross, and not on the net amount of the freight, is a legal usage. — *Dallas* C. J. *dubitante*.

ASSUMPSIT on an open policy of insurance on freight. At the trial before *Dallas* C. J. *London* sittings after *Trinity* term last, it appeared that the ship *Juliana*, bound from the *East Indies* to *London*, was totally lost just before the termination of her voyage. The freight payable to the Plaintiffs in the event of the safe arrival of the ship would have been 3068*l.*; but out of this the Plaintiffs must must have paid 699*l.* 9*s.* for seamen's wages, pilotage, light dues, tonnage duty, and dock

(*a*) *Richardson* J. was absent during the whole of this term, being prevented from attending by ill health.

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dock dues; from which payment they were altogether exempted by the loss of the vessel.

The Defendant contended that the Plaintiffs were entitled to recover from the insurers, not the amount of the gross freight, but only the amount of the net freight, after deducting the charges which the Plaintiffs must necessarily have incurred had the ship arrived in safety; and he paid into court sufficient to cover his proportion of the amount of the net freight.

The Plaintiffs persisted in demanding the amount of the gross freight, and called merchants of 30 and 40 years' experience at *Lloyd's*, who concurred in stating, that though open policies on freight were extremely rare, the uniform custom in settling losses upon them, had been to pay the assured on the amount of the gross freight.

To the admission of this evidence the Defendant objected, on the ground that it proposed to establish the existence of a custom contrary to law, a policy of insurance being a contract, the object of which was to secure to the assured a bare indemnity; whereas a usage such as the present would secure to him a profit on, and operate as inducement to the loss of ship.

The learned Judge having admitted the evidence, subject to future discussion on the point, the Defendant called witnesses nearly equal in number and experience, who stated that they were not aware of the existence of the usage stated by the Plaintiffs' witnesses.

The jury having found for the Plaintiffs the whole demand,

Bosanquet Serjt. now moved for a rule to shew cause why the verdict for the Plaintiffs should not be set aside, and a nonsuit, or a verdict for the Defendant, be entered instead, on the ground that the evidence admitted for the Plaintiffs ought to have been excluded, and that, at

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all events, the usage established thereby was contrary to law, and to the very nature of an insurance. Instead of an indemnity, the owner would, if the usage were sustained, derive a very great advantage from the loss of his ship; in the present instance, in the proportion of near 700 to 3068, in many instances considerably more: indeed it would be his interest that the ship should be lost as soon as possible after quitting her port of departure, as he would then secure his freight, and be saved the whole expence of paying and provisioning the crew for the voyage, and of defraying the heavy port charges, to which he would otherwise be liable. Then, in all adjustments of general average to which ship, cargo, and freight contributed, the charge on freight was always calculated on the net, and not on the gross freight (*a*), and if the owner was called on to pay in that proportion, why should he be paid in a greater?

DALLAS C. J. The evidence in support of the usage was as strong as possible; the evidence on the part of the Defendant only of a negative character, and I put it to the jury to consider whether the usage was so notorious as to imply a knowledge of it in the parties to the action, and so to form a part of their contract. But the Defendant's counsel contends that, admitting the existence of the usage, it is contrary to law — contrary to the very principle of a policy of insurance, as being no more than a contract for indemnity — opening a wide gate to fraud, and thence, that in law, it cannot be supported. Without giving any opinion on the subject, I think the point of considerable importance, and worthy of further consideration.

(*a*) *Park on Insur.* 209. 7th ed. *Marshall on Insur.* 467.

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PARK J. I think a rule ought not to be granted in this case. The chief objection made on the part of the Defendant is, that the evidence ought not to have been admitted. I think it was properly admitted on both sides, and, if it was admissible, there can be no ground for a new trial; the jury would have drawn a very wrong conclusion if they had found there was no such usage. They have found that open policies on freight have always been settled in this manner, and my experience entirely coincides with that finding.

BURROUGH J. In questions on policies of insurance, the course has always been to ascertain the custom of merchants; there is a strong instance of this in 1 *Burr. Rep.* (*a*), where it being found to be an universal and well known usage for *China* ships to unrig and place their tackle in a warehouse on *Bank Saul* in *Canton River*, the insurers on a ship were held liable for a loss happening to her tackle by fire on this *Bank Saul*. Now, the usage in the present instance, is as well known to all the brokers as that was relating to *Bank Saul*, and, in these cases, the usage of trade has always been the ground of decision.

Rule refused.

(*a*) *Pelly* v. *Royal Exchange*, 1 *Burr.* 341.

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HUGGETT *v.* PARKIN.

Nov. 14.

If a party incurs the expense of resisting a rule to quash a writ for irregularity, and it turns out that the irregularity is not in the writ, but only in the service, the Court will discharge the rule with costs.

VAUGHAN Serjt. had obtained a rule *nisi* to quash the writ of *capias ad respondendum*, and to set aside all further proceedings in this case for an irregularity in the indorsement; but, upon *Hullock* Serjt. shewing cause, it turned out that the irregularity was not in the writ but in the copy served, and he cited *Grojan* v. *Lee* (*a*), to shew that in such case the rule must be discharged because it asks too much; the Plaintiff was obliged to appear to support his writ, when, if the service of it had alone been impeached, he might have admitted the irregularity without incurring the expence of resistance.

Vaughan, in support of his rule, said the Defendant had no means of knowing the form of the writ except by the copy.

Sed per Curiam; the writ is good; the service alone is bad; the Court cannot set aside a good writ; but you, by calling on them to do so, render it necessary for the party to appear in support of his writ.

The rule must therefore be

Discharged, with costs.

(*a*) 5 *Taunt.* 651.

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Nov. 14.

PRIDDEE *v.* COOPER.

Process may be served at any hour.

VAUGHAN Serjt. shewed cause against a rule obtained by *Hullock* Serjt., to set aside the service of a *capias ad respondendum*, and all subsequent proceedings on the ground of irregularity, because the service did not take place till after ten at night. *Vaughan* argued that there was a distinction between service of notices and service of process; that unless the latter could be served at any hour, there might be no means of catching the Defendant.

The Court being also clearly of this opinion, the rule was

Discharged, with costs.

Nov. 14.

TRICKEY *v.* YEANDALL.

The Court will not decide on the necessity of pleas, or refer them to the prothonotary in a question which, on the face of them, appears to be one of doubt and nicety.

TO an action of trespass, the Defendant pleaded in justification a right of way which was variously described in several pleas, and a new way having been substituted by the Plaintiff for one formerly used by the Defendant, there were, for every distinct mode of stating the right, two pleas exactly alike, except that one applied to the old, and the other to the new way. The fourth and fifth pleas having described the right to be for the Defendant to go "by himself, and his servants, *and* with horses;" and the sixth and seventh pleas, for the Defendant to go "by himself, and his servants, *with* horses,"

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Pell Serjt. obtained a rule, calling on the Defendant to shew cause why it should not be referred to the prothonotary, to consider the several pleas in the rule specified, and to determine whether the sixth and seventh pleas should not be struck out as irrelevant and unnecessary.

Lens Serjt., who shewed cause against the rule, now endeavoured to distinguish the pleas, and urged, that at all events the Court would not decide on the necessity of pleas, or refer them to the prothonotary in a question, which, on the face of them, appeared to be a question of doubt and nicety.

The Court concurring in this position, the rule was

Discharged, but without costs.

MONTELLANO *v.* GARCIAS.

Nov. 15.

A Defendant cannot call for security for costs after undertaking to accept short notice of trial.

SO long since as 1817 the Defendant had obtained time to plead, on an agreement to take short notice of trial. The cause having in the meanwhile been unavoidably delayed, notice of trial was at length given in *January* last, and the Plaintiff was in a condition to have signed judgment in *Easter* term last: having omitted to do this, in the hope of bringing the Defendant to some terms, the Defendant now obtained a rule *nisi* to stay proceedings till security should have been given for costs, the Plaintiff being a foreigner and living out of the jurisdiction of the court.

Taddy Serjt., who shewed cause, cited *Muller* v. *Gernon* (*a*), and *Steel* v. *Lacy* (*b*), to shew that the De-

(*a*) 3 *Taunt.* 272. (*b*) *Ibid.* in note.

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fendant was not entitled to any such rule after having undertaken to accept short notice of trial; to which the Court agreeing, the rule was

Discharged.

Nov. 15.

CHRISTIE v. WALKER and Four Others.

Where the affidavits to hold to bail named five defendants; separate bailable process was issued against one, and serviceable process against the other four, who were not named in the bailable process; the bailpiece named only the single defendant against whom the bailable process had issued, and the declaration was against all five defendants,

The Court refused to enter an *exoneretur* on the bailpiece, which was moved for on the ground of a variance between the process and declaration.

THE affidavit to hold to bail named all the five Defendants; a bailable *capias* was issued against *Walker*, in which the other four Defendants were not named, (either in the body of the writ or in the *ac etiam* clause,) and serviceable process was issued against the other four Defendants. The bailpiece named only *Walker*, of the five Defendants; the declaration was against all five.

Hullock Serjt. moved for a rule to shew cause why an *exoneretur* should not be entered on the bailpiece, on the ground, that there was a variance between the writ and bailpiece, and the declaration; and he cited *Delacour* v. *Read* (*a*), where this relief was granted, on account of a variance between the affidavit to hold to bail and declaration; *Kerr* v. *Sheriff* (*b*), where it was granted for a variance between the writ and the declaration; and *Spalding* v. *Mure* (*c*); where the action was against three, as surviving partners, and the declaration against them in their own right. He also cited *Tetherington* v. *Golding*. (*d*)

But the Court, upon consideration, thought the present case distinguishable from all those which had been

(*a*) 2 *H. Bl.* 278.
(*b*) 2 *B. & P.* 358.
(*c*) 6 *T. R.* 363.
(*d*) 7 *T. R.* 80.

cited;

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CHRISTIE v. WALKER.

cited; that here, the Plaintiff was obliged to sue out two writs, under the rule by which he is precluded from joining more than four Defendants in one, and ought not to suffer for observing the rules of the Court; that it was not necessary he should arrest and hold to bail all the Defendants, or more of them than he thought fit; that having arrested only one, it was necessary the bailpiece should agree with the writ on which that one was arrested; that the affidavit of debt agreed with the declaration, so that there was no reason to suppose the bail were ignorant of the precise nature of the cause in which they were engaged.

Upon these grounds the rule was refused, and *Hullock*

Took nothing.

ADAMS *v.* STATON.

Nov. 15.

Where the prothonotary refused to allow costs on account of gross misconduct on the part of the Plaintiff's attorney, the Court refused a rule for the prothonotary to review his taxation, though Defendant had stayed proceedings under a rule for staying them on payment of debt and costs.

THE Defendant had obtained a rule to stay proceedings, on payment of debt and costs. The prothonotary, under all the circumstances of the case, refused to allow the Plaintiff any costs; whereupon

Vaughan Serjt. obtained a rule calling on the Defendant to shew cause why the prothonotary should not review his taxation, contending, that whatever the circumstances of the case might be, or whatever the Plaintiff's demerits, he was entitled to some costs, however small, by the very terms of the Defendant's rule.

The prothonotary then stated the circumstances of the case, as follows. The action was on a bill of exchange, part of which the Defendant paid, and was allowed till a certain time the next day to pay the residue; he said, till one o'clock, and the Plaintiff's attorney admitted he was allowed till eleven: at half after eleven on that

 day,

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ADAMS v. STATON.

day, the Defendant called, with the residue of the money, on the Plaintiff's attorney, who was at home, but refused to see him, desiring him to call the next day. By the next day, three writs had been issued on the bill.

The Court instantly discharged the rule, and intimated that such conduct might in future be visited in a different way.

Rule discharged.

Nov. 15.

MASTER v. MILNER.

The Plaintiff in a special jury tithe cause, being under a peremptory undertaking to try at the next assizes, the absence of eleven special jurymen was held a sufficient reason for his declining to proceed, (though a tales had been prayed, and some of the talesmen sworn,) and the Court, on a fresh peremptory undertaking to try at the next assizes, discharged a rule *nisi* for judgment as in case of a nonsuit.

IN *Easter* term last a rule for judgment, as in case of nonsuit, had been granted in this cause, (an action by a clergyman for the tithes of potatoes and turnips) which rule was discharged, on a peremptory undertaking. When the cause (for which a special jury had been appointed) came on to be tried at the last *Chester* assizes, only one of the special jury attended, and the Plaintiff, for that reason, declined proceeding, though not till a tales had been prayed, and some of the talesmen actually sworn.

Hullock Serjt., on a former day in this term, obtained a rule, calling on the Plaintiff to shew cause, why the like judgment should not be granted, as in case of a nonsuit.

But the Court, on hearing *Taddy* Serjt., against the rule, thought, that in such a cause, the absence of special jurors was a sufficient reason for the Plaintiff's declining to proceed; and on his giving a peremptory undertaking, the rule was

Discharged.

BURR *v.* FREETHY.

Nov. 16.

A SHERIFF'S officer on the part of the Plaintiff had taken the Defendant's goods in execution; the Plaintiff, at the request of the Defendant, (and on receiving from him a written consent or warrant for the officer to levy again if the debt should not be paid within a given time,) ordered the officer to withdraw. The Defendant's goods having been seized under a subsequent execution at the suit of another Plaintiff, the Plaintiff *Burr*'s officer placed his warrant in the hands of the second Plaintiff's officer for the purpose of a fresh levy. But the Defendant having become a bankrupt, the second Plaintiff's officer left the residue of the goods, after the second execution alone had been satisfied, in the possession of the Defendant's assignees, who contended that the first execution had been abandoned, as against the second, and the claim of the assignees. The effects were sufficient to satisfy both executions, and the Plaintiff, *Burr*, insisting that his execution had never in effect been abandoned, and that at all events he was entitled before the assignees, ruled the sheriff to return the writ, on the ground that he was bound to satisfy both executions before considering the claim of the assignees.

Where a Plaintiff withdrew his execution under a consent from the Defendant that there should be a fresh levy if the debt were not paid within a given time; and the Defendant's goods having been seized under an execution at the suit of another Plaintiff, the first Plaintiff placed his warrant in the hands of the second Plaintiff's officer, who, the Defendant having become a bankrupt, left in the possession of his assignees all the effects remaining, after satisfying the second Plaintiff's execution, to the exclusion of the first Plaintiff, The Court, though the effects were sufficient to satisfy both executions, would not compel the sheriff to return the first Plaintiff's writ till he should have been indemnified, and the prothonotary should have decided which of the parties should indemnify him.

Vaughan Serjt., on the part of the sheriff, obtained a rule, calling on *Burr* to shew cause why this rule for a return should not be discharged.

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The Court, after hearing *Onslow* Serjt. against *Vaughan's* rule, thought the sheriff, being excused by *Burr's* own act, ought not to incur the expence of contesting the question between the assignees and *Burr*: they therefore enlarged the rule for a return, till the parties should have gone before the prothonotary, and he should have directed a proper indemnity for the sheriff.

Nov. 18.

SMALE Demandant, BREMRIDGE Tenant, ADAMS Vouchee.

Recovery permitted to pass, notwithstanding an alteration in the caption of the warrants of attorney, the affidavit of the due acknowledgement thereof, and the notarial certificate.

ON the motion of *Lens* Serjt., the Court permitted a recovery to pass, notwithstanding some alterations which had been made on the face of the caption of the warrants of attorney, the affidavit of the due acknowledgment thereof, and the notarial certificate : these instruments had been sent out from this country to *Demerara*, and all through them, that colony having by mistake been styled the *Island* of *Demerara*, some person there, had in every instance where the word *Island* occurred, drawn a pen through that word, and had written over it the word *Colony*, but by whom, or at what precise time this had been done did not appear.

1822.

PRICE Demandant, WATKINS Deforciant.

Nov. 19.

The Court refused to suspend the granting of the *fiat* of a fine, upon an affidavit that the deforciant was between 90 and 100 years old, and imbecile in mind.

LENS Serjt., upon an affidavit that the Deponent was informed, and believed the Deforciant in this fine to be childish and imbecile in mind, being between 90 and 100 years of age, moved that the granting of the *fiat* might be suspended till the Deforciant should have been examined. But the Court thought that, even if it could be taken upon this affidavit that the Deforciant was imbecile at the present time, there was no allegation that she was so when the proceeding commenced, and that it might be of dangerous consequence to grant the application. *Lens*, therefore,

Took nothing.

SUMMERSETT *v.* ADAMSON.

Nov. 19.

In an action of trover for goods, one of the Plaintiff's witnesses stated, on cross examination, that he had heard the Plaintiff say he had been discharged under the Lords' act subsequently to the sale of the goods: a verdict having been found for the Plaintiff, the Court discharged a rule *nisi* to set it aside, which had been moved for on the ground that the Plaintiff's declaration shewed he had no title to sue.

THE Defendant, an auctioneer, had sold goods in 1817, under a commission of bankruptcy against the Plaintiff, for the value of which goods, the commission having afterwards been superseded, the Plaintiff sued in trover.

At the trial before *Dallas* C. J. *London* sittings after *Trinity* term last, one of the witnesses, on cross-examination, stated he had heard the Plaintiff say, that

he

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he had been discharged under the Lords' act (a) in *January* 1820, which was after the sale of the goods.

Upon this, the Defendant's counsel objected that the property in the goods in question was in the Plaintiff's assignee under the Lords' act, and that the Plaintiff must be nonsuited for want of title. The point was reserved, and the jury found a verdict for the Plaintiff.

Taddy Serjt., on a former day obtained, on the ground of the objection made at the trial, a rule to shew cause why the verdict for the Plaintiff should not be set aside and a nonsuit be entered.

Lens Serjt., who shewed cause against the rule, argued that a loose admission of the Plaintiff's upon a matter involving knowledge of law as well as statement of fact, ought not to be taken as conclusive against him; that the Defendant, who raised the objection, ought to have sustained it, not by the mere report of a conversation, but by the best evidence which the nature of the case supplied, by the appropriate evidence of the written assignment: if that existed, the conversation was not evidence; if it did not exist, there had been no assignment; besides, the Plaintiff might have been discharged, and the assignment might never have been made, or it might have been irregular and void, so that the conversation reported did not sustain the inference which the Defendant wished to draw from it.

Taddy, in support of his rule, contended that it was not incumbent on the Defendant to prove any thing, but that the Plaintiff must make out a good title *in omnibus*, or he could not sustain his case; that the Plaintiff's own admission, touching his discharge, was

(a) 32 *Geo.* 2. *c.* 28.

evidence

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evidence of the most conclusive nature; that if his discharge had taken place without an assignment, he would have been guilty of an offence punishable by transportation under the Lords' act, and the Court would not presume a crime to have been committed. As to any possible irregularity in the assignment, that instrument was part of the proceedings of the Court in the case of an insolvent, and with respect to the proceedings of a court, the known rule was *omnia presumuntur rite acta.*

DALLAS C. J. The only evidence of a discharge under the insolvent debtor's act, was a supposed admission by the party himself, for if he had been really discharged, the fact would have appeared on the proceedings of the Insolvent Debtors' Court, and the party who raised the objection might have established it by that evidence. But it has been urged, that by his own admission, the Plaintiff is devested of all right to sue: that may be the case where the admission is of a fact within the party's own knowledge, but not where, as in the present instance, the matter admitted is mixed up of law and fact. The property of which an insolvent is devested, certainly becomes vested in his assignees if the provisions of the statute have been complied with; if not, it remains in the insolvent. The statute says (*a*), that the "prisoner shall deliver in upon oath, a full, true, and just account, disclosure and discovery in writing, of the whole of his real and personal estate, &c.; and on the delivering in of such account, the estate and effects of such prisoner, shall be assigned and conveyed by such prisoner by a short indorsement on the back of such account." The right of the assignees depends on an assignment being legally made to them, and on

(*a*) 32 *Geo.* 2. *c.* 28. *s.* 17.

its

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its being followed up by possession; here there has been no intervention on the part of the assignees, and we cannot suppose the whole transaction to have been regular, merely because the party has said that he was discharged. If the property was really vested in the assignees, the Defendant might have proved, and ought to have proved that fact.

PARK J. Loose expressions like this ought not to be taken as conclusive, that all has been rightly done under the various provisions of an act of parliament: the party who elicited the supposed admission on cross-examination, ought to have sustained it by the production of the appropriate evidence.

BURROUGH J. We are desired to say, that this expression included all that was necessary to devest the insolvent of his property. I think it does not: he might have been discharged; but it does not follow as a matter of course, that any thing was done to devest him of property. The rule must be discharged.

Rule discharged.

ST. JOHN *v.* CHAMPNEYS.

Nov. 19.

By 53 *G.* 3. *c.* 141. it is enacted, that within thirty days after the execution of every deed, &c. whereby any annuity or rent charge shall, from and after the passing of the said act, be granted for life or lives, or for any term of years, or greater estate determinable on life or lives, a memorial of the date of every such deed, &c. of the names of all the parties and all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent charge shall be granted, and of the person or persons by whom the same is to be beneficially received, shall be enrolled in Chancery, in the form or to the effect therein exemplified, with such alterations as the nature and circumstances of any particular case may reasonably require; and in a schedule, the following directions are given as to the mode of describing the witnesses in the memorial: at the head of one of several columns, which are to contain the substance of the deeds, stand the words "names of witnesses;" and underneath, as applicable to indentures of lease and release, the letters and words "*E. F.* of ——, *G. H.* of ——;" and as applicable to a bond and warrant of attorney to confess judgment, the letters "*E. F.*, *G. H.*" Where the witnesses to the deeds were attorneys' clerks, Held, that they were sufficiently described in the memorial as clerks to *E. H.* (their employer,) of *B.* (the employer's residence.)

BY the 53 *G.* 3. *c.* 141. *s.* 6. it is enacted, that within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall, from and after the passing of the said act, be granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, &c. of the names of all the parties, and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent charge shall be granted, and of the person or persons by whom the same is to be beneficially received, shall be enrolled in the High Court of Chancery, in the form or to the effect therein exemplified, with such alterations therein, as the nature and circumstances of any particular case may reasonably require. And in a schedule the following directions are given, as to the mode of describing the witnesses in the memorial: At the head of one of several columns which are to contain the substance of the deed, stand the words "names of witnesses," and underneath, as applicable to indentures

of

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of lease and release, the letters and words "*E. F.* of——— *G. H.* of———;" and as applicable to a bond and warrant of attorney to confess judgment, the letters "*E. F.*, *G. H.*"

In *Hilary* term, 1822, the Court of King's Bench putting a construction on this part of the statute, decided, in a case where the witness was an attorney's clerk, that the witness's place of abode ought to be stated; and that it was not a sufficient statement of his abode to describe him as clerk to an attorney, and then to state the attorney's abode. (*a*)

In *July* 1822, an act of parliament was passed, which, [after reciting the enactment of 53 *G.* 3. *c.* 141., and that in consequence of such indistinct enactment, it might be doubtful whether it was the intention of the legislature to require any, or if any, what description should be added to the names of the witnesses in the memorial of any annuity deed,] — declared, "that by the said act of the 53 *G.* 3. *c.* 141., no further or other description of the subscribing witness or witnesses to any deed, &c. whereby any annuity or rent charge is or may be granted, is required in the memorial thereof, besides the names of all such witnesses, and so the said act shall be construed, deemed, and taken:" with a proviso, "that this act shall not affect or prejudice any suit or proceeding at law or in equity, commenced on or before the 31st day of *May*, 1822, and now depending, upon the ground of an alleged defect in the memorial thereof, in not describing the witnesses thereto, otherwise than by his, her, or their name or names, for avoiding any such deed, &c."

In 1818, the Defendant, Sir *Thomas Swymmer Champneys* and his wife had granted an annuity to the Plaintiff, General *St. John*, secured by a warrant of attorney to enter up judgment, and in the memorial of this annuity, the witnesses to the instruments were described

(*a*) *Darwin* v. *Lincoln*, 5 *B.* & *A.* 444. *Smith* v. *Pritchard*, *id.* 717.

as follows: "*Thomas James Denkin*, *James Felton Cooke*, clerks to Mr. *Edward Howard*, of *Corke-street*, *Burlington Gardens*, in the county of *Middlesex*."

In *Easter* term last, *Lawes* Serjt., on behalf of the Defendant, obtained a rule, calling on the Plaintiff to shew cause why all the several proceedings upon the judgment signed in this cause should not be stayed, and why the annuity granted by the Defendant and his wife to the Plaintiff should not be set aside; and why the deeds whereby the said annuity was secured, should not be delivered up to be cancelled, and the said judgment vacated, a part of the consideration money having been retained, and the memorial being defective in not stating the names of all the persons by whom the said annuity was to be beneficially received, and in not stating the place of abode of the witnesses to the said several deeds.

The last mentioned act of parliament (3 *G*. 4. *c*. 92.) being actually in progress in the legislature when this rule was obtained, the discussion on the rule was postponed till the present term; when, it having been admitted that no part of the consideration money had been retained by General *St. John*, and that there was no omission of names of persons by whom the annuity had been beneficially received,

Vaughan and *Taddy* Serjts., who shewed cause against the rule, argued to the following effect. First, the present case is not within the proviso of 3 *G*. 4. *c*. 92. *s*. 4., which excepts from the operation of that act all proceedings commenced before 31st of *May*, 1822, and at the time of passing the act, depending, "upon the ground of an alleged defect in the memorial of the deeds, in not describing the witnesses thereto, otherwise than by his, her, or their name or names." The defect objected to in the present cause, is not an omission to describe the witnesses,

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witnesses, further or otherwise than by name, but the having added to the names a description different from that, which (according to decisions in the Court of King's Bench) is required by 53 *G.* 3. *c.* 141. If the present case is not within the proviso in *s.* 4. of 3 *G.* 4. *c.* 92., then by the express enactment of that statute, there is an end of the objection touching the description of these witnesses.

Admitting, however, for the purpose of argument, that the present case is excepted from the operation of 3 *G.* 4. *c.* 92. then the witnesses must be described according to the provisions of 53 *G.* 3. *c.* 141. Now that act does not any where require, that the witnesses' place of abode shall be described in the memorial, but only their names[a]; as the object of the memorial is to set out the substance of the deed. The schedule of the act, indeed, which directs in what manner the material parts of an annuity deed shall be set out, contains several columns, at the head of one of which are the words "names of witnesses," and underneath, as applicable to indentures of lease and release, the letters and words "*E. F.* of———" and "*G. H.* of———" from whence it might be inferred, that some description was required to be given to the witness; though there is no reason for saying that such description was meant to be of his place of abode, rather than of his place of occupation: however, it should seem, that the word "of" may have crept in through inadvertence, or without any particular meaning; since further on, as applicable to a bond and warrant of attorney to confess judgment, the letters *E. F.* and *G. H.* are inserted without the addition of the word "of." But admitting, that by virtue of the word "of" in the schedule, some description is required of the witnesses to the deed of lease and release, why must that description in all cases be of the abode of the witness; why may it not vary according to circumstances, as the blank left after the word "of," and the very words of

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the enacting clause must lead us to infer was the intention of the legislature? The object of the act was by a recorded memorial to secure the means of enquiry into annuity transactions whenever circumstances should call for enquiry: if so, an attorney's clerk is much more likely to be heard of at the house of his employer, than in an obscure lodging. In affidavits to hold to bail, and in other matters touching process, attorney's clerks have always inserted the place of their principal's residence, where such clerks have been occupied during the day, and not their place of abode at night; and Lord *Ellenborough* thought this the better description in cases where much strictness is required, *Haslope* v. *Thorne*. (a) It is true, the Court of King's Bench have come to a different decision in *Darwin* v. *Lincoln*, and *Smith* v. *Pritchard*; but for the reasons before given, those decisions do not seem sustainable either under the letter or the intention of 53 *G.* 3. *c.* 141.

Lawes and *Peake* Serjts., in support of the rule, contended that this case was within the proviso of 3 *G.* 4. *c.* 92., and that to give that proviso the narrow and critical construction attempted on the other side, would deprive it of all useful effect. Further, they argued that the 3 *G.* 4. *c.* 92. was only prospectively declaratory; for, if it were otherwise, and should be held in effect to reverse the decisions in the King's Bench, the proviso would be a mere mockery as to the present Defendant; that therefore, as to this case, the 53 *G.* 3. *c.* 141. must be construed as if the 3 *G.* 4. *c.* 92. had never passed: so construing that act, and the preceding act of 17 *G.* 3. *c.* 26., they contended that nothing would satisfy the intention of those acts, and the blank left after the

(a) 1 *M.* & *S.* 103.

 word

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word "of ———" in 53 *G.* 3. *c.* 141., but a description of the witness's place of abode, that being the only place in which enquiry for the witness could be made with probability of success, inasmuch as the grantor's attorney might be implicated in transactions which would have the effect of setting the annuity aside, and might refuse to give the address of a clerk who might be no longer in his service. They concluded by relying on *Darwin* v. *Lincoln* and *Smith* v. *Pritchard.*

DALLAS C. J. It is admitted that this case is free from any objection on the ground of retainer of part of the consideration paid for the annuity, or of privity on the part of General *St. John*, to the conduct or misconduct of *Gibbs* and *Howard*: this is a fair and honourable case; asserted to be so on one side; not denied on the other: and though the motion was made on the ground of a retainer of part of the consideration, that ground has been abandoned, and the only objection now remaining, is, that the witnesses have been described by their place of occupation and not by their place of abode; it is not pretended that any inconvenience was occasioned by this mode of description, or that the witnesses could not be found; the question resolves itself into an objection of form, against the merits of the case: however, it is not the less entitled to be considered in a court of justice, because we must decide according to the law, whatever that law may be.

The question, (which arises on different acts of parliament,) is, whether the place of his occupation be a proper description for the witness to an annuity deed, or the place of his abode. With a view to this question, it will be necessary for me to advert to the different statutes concerning this subject, which are, the 17 *G.* 3. *c.* 26., 53 *G.* 3. *c.* 141., and 3 *G.* 4. *c.* 92.

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And first, with respect to 3 G. 4., is it, or is it not declaratory, and if so, is it retrospectively or prospectively so? If it is retrospective, there is an end of the question, (unless the present case be excepted by the proviso,) because the names only of the witnesses are required to be stated in the memorial, and not even the addition of their place of occupation. Is this case, or is it not, excepted by the proviso?

On these questions there may be difficulty, which I shall not now proceed to examine, though I think that the present case was intended to be excepted by the proviso in the last act; for, if it was intended that the act should be retrospective in every possible case, there would have been no use in the saving clause:

However, admitting this to be a case excepted, we must enquire how the law stood previously to the passing of the late act. In passing the 17 *G.* 3. *c.* 26., the legislature considered the granting of annuities as then practised, a pernicious habit; but under that impression, what did it require the memorial to contain? not the place of abode, not the place of occupation, but merely the names of the witnesses. Then came 53 *G.* 3. *c.* 141., and in the interval those crowds of cases, with respect to which it was said, that doubts had been occasioned whether the act had not produced more harm than good. In the enacting clause of 53 *G.* 3. *c.* 141., the description of the witness is not required to be stated, but it is required by the schedule, which for this purpose must be considered as forming part of the enacting clause. But what does the schedule say? At the head of one of several columns which are to contain the subsubstance of the deeds, are the words "names of witnesses," and underneath, as applicable to indentures of lease and release, the letters and words "*E. F.* of——— *G. H.* of——— " Not, of such a place or of such an occupation; but it leaves the description to be varied as the nature of the case may require.

 Now

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Now the act must be construed reasonably; that is, so as to suppress wrong, or advance the remedy against it:

With this view, let us proceed by steps, and enquire into the nature of attestations in general, for the object of them must be the same in all cases. Attached to a deed they can mean nothing, if it be not that the witness should be forthcoming on any proper occasion, to authenticate the instrument he has attested; but, whether they be attached to a deed or will, the law does not require the witness's place of occupation or abode. I agree, that cases like the present stand on a different ground; that there may be one kind of description required in affidavits to hold to bail, another in notices of justification of bail, and in services of process, another; that the nature of the attestation must in each case depend upon the nature of the instrument: but, in deciding on the description proper to be employed on such occasions, what view have the courts taken of the subject? In *Haslope* v. *Thorn* (a), where the deponent, in an affidavit to hold to bail, was described by his place of occupation, the counsel relied on this being the usual form: that case is not perfectly in point with the present; the practice there depended on a rule of court; but to get at the meaning of the rule, we must look to the reason of the thing. The case turned on a rule which required the true place of abode, and true addition of every person making an affidavit: The 53 *G.* 3. *c.* 141., requires no such description: and what did the Court hold there, where so much more was required than under the act of parliament? It was contended, that the place of abode meant the place where the person usually slept:

Lord *Ellenborough* said, "that the words *place of abode* did not necessarily mean the place where the

(a) 1 *M.* & *S.* 103.

deponent

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deponent slept; that the object of the rule of court was to ascertain the place where the deponent was most usually to be found, which in that case was the office at which he was employed during the greater part of the day, and not the place whither he retired merely for the purposes of rest."

Let us lay aside for a moment the words of the rule and the words of the act, and, the object being to secure the means of ascertaining where a witness is to be found, consider the best means of attaining that object; Lord *Ellenborough* says, that the place of the witness's occupation is a more likely place in which to find him, than that to which he retires merely for the purposes of rest, and thus the question stands on the reason of the thing.

With respect to this, however, difficulties have been raised in the course of the argument, and it has been urged, that the requisite information might be refused at the witness's place of occupation: but why is that to be presumed, or why is it more likely to happen there than at an obscure lodging? There is nothing in the objection, nor is it likely that erroneous information will be given in the one place rather than in the other.

So that here is a case strong to shew what would be a reasonable construction for the description required by the statute. Such, indeed, would have been a reasonable construction, if even the word *abode* had been found in the statute; instead of this, a blank is left after the word "*of*," as if for the purpose of allowing the description to vary, according to the peculiar circumstances of each case. Looking to all the objects of the statute, we are bound to give it a reasonable construction; and I think the attestation required has been sufficiently followed in this case.

We have been pressed with two cases decided in the Court of King's Bench, by which a different construction has been put on the language of 53 G. 3.

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No person entertains more respect for the decisions of that court than I do; but, in order to estimate the force of those cases, it is necessary that we should put ourselves in the situation of the judges of the court of King's Bench when they pronounced those decisions: they had before them only 53 *G.* 3., but since that time the 3 *G.* 4. has passed, which says, that the 53 *G.* 3. is so indistinctly worded, that "it may be doubtful whether it was the intention of the legislature to require any, or if any, what description, to be added to the names of witnesses in the memorial of any deed, &c. to be enrolled as aforesaid."

To speak plainly, I must consider those cases as standing on doubtful grounds. I am obliged to express myself thus unreservedly, because the 3 *Geo.* 4. says, the act on which those cases turned is in itself sufficiently ambiguous. I am not called on to decide what I should have done in those cases: but, putting the whole matter together, — that the 17 *G.* 3. requires no description of the abode, — that the schedule of 53 *G.* 3. is of doubtful meaning, — and that, according to the 3 *G.* 4. no more is rendered necessary than the mere names of the witnesses, — I think there is as little in point of form as of justice in the objections raised against this memorial.

Park J. expressed himself of the same opinion, but declined saying more, as his Lordship had gone so fully into the subject.

Burrough J. The last act has put an end to the question; but if it turned solely on the construction of 53 *G.* 3., I think there can be no difficulty. That act requires a memorial of the deed; not any thing new, but merely that the memorial shall pursue whatever description may be contained in the deed; and this will clearly appear by reference to the columns in the schedule;

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dule; where there is provision made for pursuing the various contents of various instruments; one column being applicable to a lease and release, another to a bond and warrant of attorney, and so on. But whether this be so or not is immaterial, because the 3 *G.* 4. says, that, "by the 53 *G.* 4. *c.* 141., no further or other description of the subscribing witness or witnesses to any deed, &c. whereby any annuity or rent-charge is or may be granted, is required in the memorial thereof, besides the names of all such witnesses;" and that this is the construction to be put on the former act. The proviso at the end of the 3 *G.* 4. does not appear to me to apply to the objection raised in this particular case. The rule, therefore, must be

Discharged with costs.

CLAPHAM *v.* HIGHAM.

Nov. 22.

Where a cause was referred to arbitration under a judge's order, and one of the parties, before the award was published, and before the judge's order was made a rule of court, revoked his submission, The arbitrator having made an award notwithstanding this revocation, the Court set aside the award, although the judge's order had been made a rule of court before any application to set aside the award.

THIS cause had, under a judge's order, been referred to an arbitrator. The Defendant, after having obtained from the arbitrator time to examine a witness, and procure a certain writing, instead of doing so, revoked the submission; notwithstanding which, the arbitrator proceeded to make his award, and the judge's order afterwards, and after the submission had been revoked, was made a rule of court.

Hullock Serjt. on a former day, had obtained a rule to shew cause why this award should not be set aside, on the ground that it was made after the Defendant's submission had been revoked.

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Cross Serjt., who shewed cause against the rule, contended, that whatever might be the case, where the submission was by deed, a party could not revoke a submission made under a judge's order; that, if it should be held he could do so, by entering into a submission at every trial, and revoking it before the order was made a rule of court in the ensuing term, he might protract proceedings *ad infinitum.* It had never been decided that a party could revoke a submission under such circumstances, and the language of the judges in *Aston* v. *George* (*a*), seemed to imply the contrary, as they only *supposed* such a revocation for the sake of argument. In *Wood* v. *Plant* (*b*), *Mansfield* C. J. said, that a judge's order is, as binding as any act of the court; so that a revocation of the submission entered into under such an order, would be a contempt of court. The award was either void or valid: if void, the application to set it aside was nugatory: if valid, it could not be set aside.

Hullock, in support of his rule, said, that *Aston* v. *George* proceeded entirely on the assumption that the submission was revoked, and he relied on it as a case in point. He also mentioned *Trotter* v. *Moysey*, an unpublished case, tried at *Newcastle* Summer assizes 1821, and referred to a barrister at *Newcastle*, under an order of *Nisi Prius.* One of the parties having discovered which way the award was likely to be given, revoked his submission, before the order had been made a rule of court. The arbitrator, nevertheless, made his award; and *Hullock* afterwards, the order being first made a rule of court, moved for an attachment for nonperformance of the award, but the Court refused the attachment, and the cause was sent down to trial again.

(*a*) 2 *B.* & *A.* 395.   (*b*) 1 *Taunt.* 47.

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DALLAS C. J. It is clear that, generally speaking, the submission may be revoked at any time before an award is made. What, then, is there to take the present case out of the general rule and to make this a valid award, though the arbitrator had no authority? The cause was submitted to arbitration under a judge's order, which was made a rule of court after one of the parties had revoked his submission. Will the subsequent rule of court make any difference in the effect of the revocation? As to that, if the submission had been by deed, the case of *Milne* v. *Gratrix* (a), would be in point; but in the subsequent case of *Aston* v. *George*, a distinction was taken between a submission by deed and a submission under a judge's order. The facts of that case were, that a judge's order had directed that a cause should be referred, and that either party wilfully preventing the arbitrator from making an award by affected delay, or otherwise, should pay such costs as the court should think reasonable and just; and it was holden, that such order might be made a rule of court after one of the parties had revoked the authority of the arbitrator; by which, a sanction is given to the course pursued by this court, in making the judge's order a rule of court after the submission was revoked. The same argument was used by *Littledale* in that case, as has been pressed upon us here, that, if the application should succeed on the ground that the submission was revoked before the order was made a rule of court, a reference under a judge's order at *Nisi Prius* would, in future, be made a means of delay. Here the authority was revoked before the order was made a rule of court, which makes this case so nearly resemble *Aston* v. *George*, that the language employed in that case will equally apply to the present. *Abbott* C. J. says, "It seems to

(a) 7 *East*, 608.

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me that there is a material distinction between a reference under a judge's order and a reference by deed; in the latter case the submission to arbitration is alone made a rule of court by virtue of the statute. It follows, therefore, that when the submission is revoked, there remains nothing which can be made a rule of court: a judge's order, on the other hand, may be made a rule of court without reference to any statute. The order in this case contains, not only the submission of the parties, but also a direction that either party shall, under certain circumstances, pay such costs to the other as the Court shall think reasonable and just."

The only ground on which they entertained the application was, that the rule enabled them to dispose of the question of costs; but they took it for granted that they could not enforce an award made after the submission had been revoked.

PARK J. If there were any ground for assisting the Plaintiff, the Court would be disposed to do so here; but it is hard to say there has been any contempt of court, when the order was made a rule subsequently to the revocation of the submission. In *Milne* v. *Gratrix* there was a rule of court, and yet the award could not be sustained; neither can it here.

BURROUGH J. Revocation is one thing, contempt of court another. For thirty years it has always been considered in *Westminster-hall* that a submission may be revoked at any time before the award is made. The present rule therefore must be made

Absolute.

Ex parte CUNNINGHAM.

Nov. 23.

An attorney who has ceased to practice may be readmitted without paying arrears of duty.

CUNNINGHAM, an attorney, having ceased to practice for many years, had obtained a rule for readmission; but the prothonotary refused to readmit him till he paid all the arrears of duty for the interval during which he had omitted to practise, conceiving that such was the rule of this court. This was resisted, on the ground that, under the circumstances, no duty was payable; and on the motion of *Onslow* Serjt. who cited *Ex parte Richards* (a) and *Ex parte Smith* (b), the court ordered him to be readmitted without payment of arrears.

(a) 1 *Chitty's Reports*, 101. (b) *Id.* 692.

In the Matter of KNIGHT.

Nov. 26.

The Court granted a rule *nisi*, calling upon an attorney to answer for alleged misconduct in a matter where no suit was depending, but which appeared to have been entrusted to him in the capacity of an attorney.

LENS Serjt., on a former day, moved for a rule calling on *Knight*, an attorney of this court, to shew cause why he should not pay over to one *Hall*, money which he had received on bills which *Hall* had requested him to get discounted: *Lens* moved this, on affidavits which, as he said, disclosed conduct on the part of *Knight*, amounting perhaps to breach of good faith, and he urged, that in such a case, the Court would exercise its authority over an attorney, as being one of the ministers of the court.

But as it appeared that what was complained of had not been done in the course of any cause in which the attorney

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attorney was engaged, and as no precedent was furnished for summary interference against an attorney, except where a cause was depending, the Court were unwilling to grant the rule, observing, that to procure bills to be discounted was not within the peculiar province of an attorney, and that the applicant must have recourse to the ordinary remedies which the law afforded.

Lens, however, having this day referred the Court to *De Woolfe and Others* v. ——— (a), and urging that the present matter had been committed to *Knight*, in his character of attorney, the Court granted a rule *nisi*.

(a) 2 *Chitty's Reports*, 68.

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BAILEY v. BAILEY and Others.

One of the sureties in a replevin bond being a material witness in the cause, the Court granted a rule for substituting another surety in his place, upon giving the Defendant's attorney notice of such rule.

THIS was an action of replevin, in which a verdict had been taken for the Plaintiff subject to the award of an arbitrator. One of the sureties in the replevin bond (which had been taken in the sum of 246*l.*) being a material witness,

Hullock Serjt., on a former day, obtained a rule *nisi* for the sheriff upon notice of the rule to the under-sheriff, to shew cause why the sheriff should not release *William Bailey*, one of the sureties named in the replevin bond, from all liability of the said *William Bailey* upon the said bond, upon the sheriff or his undersheriff being tendered a new and another replevin bond, in which the Plaintiff and two other sufficient sureties should be obligors to the sheriff in the penal sum of 246*l.* with the usual conditions in a replevin bond, such sureties

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and obligors in such new bond to be first approved of by one of the prothonotaries.

No cause was shewn against the rule, but upon a suggestion from the prothonotary, the Court this day, on making it absolute, added to the rule the condition, that it should be served upon the attorney or agent for the Defendant in the action, because the Defendant would be deprived of the advantage of suing the sheriff for taking an insufficient surety, that surety being interposed by the authority of the Court.

ROGERSON and Another, Executors of JOSIAH STEVENS, deceased, *v.* LADBROKE and Others.

Nov. 23.

A.'s bankers, for nine or ten years previous to his death, had been in the habit of accommodating him with a loan of 1000*l*. upon the security of his promissory note, which was renewed every three months, the bankers, upon those occasions, discounting the note by placing the amount of it to the credit of *A*., as cash paid in by him, and debiting him on the other side with the discount. *A*. also, about two months prior to his death, accepted, payable at his bankers, a bill drawn by *B*. on *A*. for 467*l*.: this bill having been paid away by *B*., was discounted by the bankers for a holder who did not indorse it, and the bankers were the holders when the bill became due. On the morning the bill became due, before the arrival of the post, the bankers who had then in their hands, 1421*l*. of *A*.'s money, wrote off the bill to the debit of *A*.'s. account; the same day's post informing them of *A*.'s death two days before, they called upon *B*. to pay, and *B*. paid them 40*l*. on account of the bill, on a representation from them that 40*l*. would be wanting to make *A*.'s account right. At this time the last promissory note for 1000*l*., given by *A*. to the bankers, had 53 days to run, but the bankers immediately entered that note, as well as the bill of exchange, to the debit of *A*.'s account, allowing on the other side a rebate of discount for the time the note had to run.

The executors of *A*., having, before the 53 days expired, sued the bankers for the balance in their hands at the time of *A*.'s death: Held, that the bankers might set-off against the demand of the executors the 467*l*. written off on the bill of exchange, but not the 1000*l*. on the promissory note.

ASSUMPSIT for money had and received by the Defendants, to the use of the testator, *Stevens*. Plea, general issue, with notice of set-off, alleging, that Plaintiffs,

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Plaintiffs, as executors, were indebted to Defendants, on a promissory note for 1000*l.*, drawn 21st *January*, 1822, and payable three months after date, and on a bill of exchange for 467*l.* 5*s.* 6*d.*, drawn by *W.* and *G. Andrews*, the 1st of *January*, 1821, accepted by *Stevens*, payable two months after date, and indorsed to the Defendants. This issue was tried before the Chief Justice, at the sittings in *London* after last *Trinity* term, and a verdict was found for the Plaintiffs for the sum of 1421*l.* 15*s.* 7*d.*, subject to the opinion of the Court upon the following case.

Josiah Stevens, the testator, who was a malster at *Kingston*, and also occupied a farm near *Bristol*, kept a cash account with the Defendants, who were bankers in *London*, for nine or ten years prior to his decease, which happened on the 2d of *March*, 1822, during which period they had been in the habit of accommodating him with the loan of 1000*l.*, upon the security of his promissory note, which was renewed every three months. The mode of carrying on this system of accommodation, was, by the testator delivering to the Defendants his promissory note, which they discounted, according to the common course of business, placing the amount of the note to the credit of the testator's account, as cash paid in by him, and debiting him on the other side with the discount; and on the day before each note became due, a fresh one was drawn and discounted in like manner.

The last of these transactions was on the 21st of *January*, 1822, when the testator made his promissory note for 1000*l.*, bearing that date, payable to the Defendants, or their order, at three months, and on delivering the same to them, they entered 1000*l.* to the credit of his account, as cash paid in by him on that day, debiting him on the other side with 12*l.* 15*s.* 6*d.*,

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the discount for the time the note had to run; the note was as follows:

"1000*l*. *Kingston, January* 21, 1822.
"Three months after date, I promise to pay Messrs. *Ladbrokes* and Co., or order, one thousand pounds, value received, on account.

"*Josiah Stevens*.

"Payable at Messrs. *Ladbrokes, London*."

Prior to this transaction, the testator being indebted to persons named *William* and *George Andrews*, they drew upon him a bill of exchange for 467*l*. 5*s*. 6*d*., bearing date the 1st of *January*, 1821 (but intended to be 1822) payable to their own order, at two months after date, which he accepted and made payable at the banking-house of the Defendants.

This bill having been paid away by Messrs. *Andrews*, was discounted by the Defendants, at the request of one *Goldsmid*, a bill-broker, who had an account with them, but who did not indorse the bill, and the Defendants were the holders at the time of its becoming due.

On *Saturday*, the 2d of *March* (two days before this bill became due, and 53 days before the promissory note given by the testator to the Defendants arrived at maturity,) the testator died at his residence near *Bristol*, whereupon Mr. *Bovill*, one of the Plaintiffs, being there, addressed a letter to the Defendants, giving them information of the fact.

On the day of the testator's death the balance of cash to the credit of his account with the Defendants was 1421*l*. 15*s*. 7*d*.

Mr. *Bovill*'s letter reached the Defendants by the post, before ten o'clock on *Monday* morning, the 4th of *March*, the day *Andrews*'s bill on the testator became due; previously to the receipt of which letter, the Defendants, in the regular course of their business, had written

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written off the bill drawn by Messrs. *Andrews* to the debit of the testator's account as paid, it being the custom of the Defendants, immediately after nine o'clock in the morning, to write off, as paid, bills in their hands, payable at their own house.

On the same morning Mr. *Goldsmid* called on the Defendants, and being informed by them of the testator's death, and "that 30*l.* or 40*l.* would be wanting to make Mr. *Stevens*'s account right," went to Messrs. *Andrews*, and then returned to the Defendants, accompanied by *William Andrews*, one of the drawers of the bill, who paid in 40*l.*, which was placed to the credit of the testator's account.

It was admitted by the Defendants, that this sum was paid in by *Andrews* to make up the deficiency which would remain after cancelling the testator's promissory note in their favour, and in entering the bill of exchange and the promissory note to the debit of the testator's account in the pass-book, they entered 1000*l.*, due to themselves, first allowing on the other side a rebate of discount for the time the note had still to run, and then they debited the testator with 467*l.* 5*s.* 6*d.*, the amount of his acceptance in favour of Messrs. *Andrews*. In the ledger of the Defendants the bill was entered first and the note afterwards. In the ledger the entries are made in the order actually paid, but in the pass-book they are made according to the order in which the vouchers of the day happen to be before the clerk, without reference to actual pr

This action was commenced on the 19th of *April*, five days before the testator's note for 1000*l.* in favour of the Defendants became due.

The questions for the opinion of the Court were, whether the Plaintiffs, under the circumstances, were entitled to recover the said sum of 1421*l.* 15*s.* 7*d.*, or some and what part thereof; and if the Court should be

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of opinion that the said Plaintiffs were entitled to recover the whole, then the verdict was to stand; if not, the whole verdict was to be reduced accordingly; and if the Court should be of opinion that the Plaintiffs were not entitled to recover any part of the said sum, then the verdict was to be entered for the Defendants, and either party was to be at liberty to turn the case into a special verdict, if the Court should think fit.

Vaughan Serjt. for the Plaintiff. First, as to the bill for 467*l*., the circumstance that the Defendants, on the day of *Stevens*'s death, called on *Andrews*, the indorser of the bill, to pay 40*l*. towards discharging it, shews conclusively that they did not, as they assert, discharge it out of *Stevens*'s money, early in the morning on the day they heard of his death; had they so received the contents, they had no right afterwards to call on *Andrews* for contribution. Then, as to the note for 1000*l*., the Defendants could not have sued on it; it was in fact no debt till 53 days after *Stevens*'s death, and this, from the circumstance of their allowing a rebate of interest, clearly appears to have been their own view of the case. If it was no debt due from *Stevens* at the time this action commenced, it could not be the subject of set-off, for a set-off must be available at the time the action is commenced, or it comes too late. *Evans* v. *Prosser*. (*a*)

Lens Serjt., for the Defendant, being relieved by the Court from speaking on the subject of the bill for 467*l*., contended, as to the note for 1000*l*., that the circumstance of that note's having never been put into circulation, but having always remained in the Defendants' hands, was conclusive to shew, that a loan of money was the foundation of the whole transaction; that

(*a*) 3 *T. R.* 186.

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the debt incurred by that loan was always due from *Stevens*; that the promissory note was no more than a collateral security; that where a note is unproductive, the party is remitted to his original right, and that *Stevens* could never have drawn his balance out of the banker's hands, without allowing the 1000*l*. he had borrowed.

DALLAS C. J. There are two distinct questions in this case; the first arises on the bill of exchange for 467*l*., and on that I never had any doubt, nor have I now. There is no ground whatever for saying that the Defendants were not entitled to pass it in account. The bill was drawn on the testator, *Stevens*, and accepted by him, payable at the Defendant's house. On the morning when it was due, the bill having been discounted by them, they, as is always done in such cases, wrote it off on the acceptor's account; and it is impossible to contend, that bankers' having no notice of the death of a party, are not entitled, when his bill becomes due, to reimburse themselves out of his funds in their hands the amount of that bill which they have before discounted. I feel as little difficulty on the other part of the case; I do not consider the whole series of borrowings to have constituted one continued loan, but that the advance of each sum at three months' discount constituted a separate transaction, on which the payee of the note given by the testator could not sue till that note became due. The discount having been deducted, the notes having three months to run, and the Defendants having endeavoured, on the death of the testator, to raise a new transaction, and allow a rebate of interest, without any previous consent on his part, shews that the transaction was not one continued loan, as my Brother *Lens* has contended. The Defendants had no right thus to

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change the nature of the transaction, and to the extent of the 1000*l.* note the Plaintiff must recover.

PARK J. I am of the same opinion. The bankers had a right to deduct the sum which they had passed in account, before notice of the testator's death; but the note for 1000*l.* stands on a very different ground: it is impossible to say, that, after giving credit for three months, a banker can, on hearing of the death of the party, of his own accord, enter a rebate of interest, and come on the funds of the deceased as for a present debt.

BURROUGH J. I have no doubt on the subject of the bill of exchange; the bankers had a right, as early as they pleased on the 4th of *March*, to place the amount of the bill to their own account, and it is immaterial what entry they made in the pass-book. The other is a very hard case, but, as lawyers, we are bound to say the debt could not be set off till the day on which it was actually due. In a cause, the circumstances of which were similar to the present, Lord *Mansfield* was much disposed to allow the set-off, till he was pressed with a case which I suggested to Mr. *Erskine*, who was concerned for the Plaintiff, and he then held, that the set-off could not be allowed, as it would alter the distribution of assets.

Judgment for Plaintiff for 954*l.* 10*s.* 1*d.*

Nov. 25.

DILLON and Another v. RIMMER.

The Defendant being indebted to the Plaintiffs on a bill of exchange, renewed the bill when it became due by giving another at a longer date, together with a warrant of attorney to confess judgment in case the second bill should not be paid when it became due, and agreed to pay the expences of the warrant of attorney, which was drawn up by the Plaintiffs' solicitor: the first bill was not given up, but the Plaintiffs retained it in possession. The second bill was paid when it became due, but not the expences of the warrant of attorney, amounting to *2l. 12s. 6d.*; whereupon the Plaintiffs sued the Defendants in assumpsit, and declared on the first bill, adding the common money counts, and a count on an account stated. The jury found a verdict for the Plaintiffs for *2l. 12s. 6d.* without specifying on what counts it should be entered up.

The Court, with a view to a suggestion to deprive the Plaintiffs of costs, allowed the verdict to be entered on the money counts, holding, that the Plaintiffs had no right to sue on the first bill.

THE Defendant being indebted to the Plaintiffs on a bill of exchange, renewed the bill when it became due by giving another at a longer date, together with a warrant of attorney, to confess judgment in case the second bill should not be paid when it became due, and agreed to pay the expences of the warrant of attorney, which was drawn up by the Plaintiffs' solicitor: the first bill was not given up, but the Plaintiffs retained it in possession. The second bill was paid when it became due, but not the expences of the warrant of attorney, amounting to *2l. 12s. 6d.* Whereupon the Plaintiffs sued the Defendant in assumpsit, and declared on the first bill, adding the common money counts, and a count on an account stated; the jury found a verdict for the Plaintiffs for *2l. 12s. 6d.*, without specifying on what counts it should be entered up.

Vaughan Serjt., on a former day, alleging that the payment of the second bill deprived the Plaintiffs of the right to sue on the first, obtained a rule *nisi* for entering up the verdict on such one of the money counts as the court should direct; with a view to a suggestion to deprive the Plaintiffs of costs under the

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London Court of Conscience act, 39 and 40 *G.* 3. *c.* 104.

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Taddy Serjt. opposed this rule on the ground, that the first bill having been left in the Plaintiffs' hands, they were entitled to sue on it as a security for the costs of the warrant of attorney, which they might recover in the shape of damages for non-payment of the bill; that a suit might be carried on for damages though the debt had been tendered, unless it was tendered on the very day when it became due; because, unless it was so tendered, the Defendant could not plead *tout temps prist*, and payment after the day would not bar the Plaintiffs' right to damages,* *Hume* v. *Peploe*. (a) Here there was no tender or payment of the first bill, and the verdict must have been given for damages on the non-payment of that bill, because there was no other matter in evidence to which it could apply. As to the renewed bill and the warrant of attorney, if they could have any effect at all, it must be in the shape of an agreement, amounting to an accord and satisfaction upon the subject of the first debt; but no agreement could operate as an accord and satisfaction on the subject of a debt, unless all the terms of such agreement were completely performed, whereas here, the payment of the costs of the warrant of attorney, which was one of the terms of the agreement, having never been made, and the first bill having never been surrendered, the Plaintiffs were remitted to their original debt, and were entitled, with a view to costs, to a verdict for a shilling on the count on the first bill, though perhaps in the present action, they might not be entitled to recover the 2*l.* 12*s.* 6*d.* at all, there being no count appropriate to that demand.

(a) 8 *East*, 168.

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DALLAS C. J. This action ought never to have been brought: the second bill which was given in lieu of the first having been duly paid, there was not a shadow of reason for suing on the first bill, or for saying it was retained as a security.

The rest of the Court concurring, the rule was made Absolute.

Nov. 25.

SHORT v. PRATT.

The Court will not call upon an attorney summarily to answer the matters of an affidavit, charging him with an indictable offence, but will leave the parties complaining to their prosecution for the offence.

PELL Serjt., upon an affidavit, imputing to two attorneys of this court, concerned in the above cause, misconduct amounting to a gross case of cheating, conspiracy, and maintenance; moved for a rule, calling on them to shew cause why they should not deliver up to the Plaintiff's present attorney certain papers belonging to the Plaintiff, explain certain accounts of monies received by them to the Plaintiff's use, and answer the matters contained in the affidavit.

But the Court thought, that as a charge had been brought forward clearly amounting to an indictable offence, they could not interfere or call on the attorneys to make an affidavit in which they might be compelled to criminate themselves: they therefore recommended another application, calling only for papers and accounts, and refused the rule for which *Pell* had moved.

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Defendant, on being arrested, placed in the officer's hands in lieu of bail, a quantity of linen drapery goods; eight days after the process was returnable, the Defendant surrendered himself to prison; and ten days after the process was returnable, the officer who arrested the Defendant, paid into the hands of the prothonotaries 30*l.* for the debt, in the cause, and 10*l.* for the costs, those being sums which the Defendant was supposed on his arrest, to have deposited with the officer in lieu of bail, under 43 *G.* 3. *c.* 46. The Defendant was afterwards, notwithstanding resistance on the part of the Plaintiff, allowed to take this money out of court, on the ground that it had been paid in by mistake.

THE Defendant had obtained a rule, calling on the Plaintiff to shew cause why the sum of 30*l.*, deposited by the Defendant for the debt in this cause, with the constable of *Dover-castle*, together with 10*l.* for costs, at the time of the Defendant's arrest, and by the said constable paid into the hands of the prothonotaries of this court, should not be paid over to the Defendant, or his attorney, the Defendant having surrendered himself in discharge of his bail.

The Plaintiff then filed an affidavit, stating that the Defendant did not, on his arrest, deposit 30*l.* or 10*l.* with the constable of *Dover-castle*, but a quantity of linen-drapery goods; that the arrest took place in *September* last; that no bail-bond was entered into; and that the said sums of 30*l.* and 10*l.* were not paid into court till the 13th of *November*, being ten days after the return of the process on which the Defendant was arrested, though the Defendant gave notice of surrendering himself on the of 11th of *November*.

Vaughan Serjt., who shewed cause against the rule, contended, that the Defendant could not be entitled to take this money out of court, unless it was paid in under the statute 43 *G.* 3. *c.* 46., in lieu of bail; that it could not be deemed to have been paid in under the statute, because it was not paid at the time of the arrest, which the statute requires, and because the payment was not made by money, but by a deposit of

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goods; the payment, therefore, must be considered to have been made, not in lieu of bail, but as part of the sum sought to be recovered.

The Court said they need not decide whether the payment had been regularly made under the statute or not; for admitting that it had not, the Defendant having surrendered, the payment must be taken to have been made in mistake, and he was entitled to receive his money again. The Plaintiffs was entitled to the security of bail, or of a sum of money in lieu, or of a detention of the Defendant's person; but the Defendant being in custody, there could be no pretence for retaining the money intended to be paid in in lieu of bail.

Rule absolute.

Nov. 25.

CRAMP v. SYMONS.

Even where matter of law alone, and no matter of fact, is referred to a barrister, the Court will not set aside an award made by him, on the ground that it is contrary to law, unless the illegality appear on the face of the award.

THIS was an action brought to determine whether fees for the interment of bodies in the chancel of the church were to be paid to the rector or to the vicar. The cause was referred to a barrister, who had decided, by simply stating in his award, that the sum sought to be recovered, was properly paid to the vicar, and that the Plaintiff had no right to bring the action to recover it back. The award then ordered each party to pay his own costs.

Lens Serjt. moved for a rule to shew cause why the award should not be set aside, and the question left open for trial, on the ground that this decision was against law.

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The Court cited several cases where barristers had been appointed to determine both law and fact, in which the courts had always held the parties bound by their decisions. (*a*) Unless an illegality clearly appeared on the face of the award, they could not interfere in such a case.

Lens endeavoured to distinguish this case as being solely a question of law, and not a mixed question of law and fact: but the Court

Refused the rule.

(*a*) *Chace* v. *Westmore*, 13 *East*, 357. *Price* v. *Hollas*, 1 *M.* & *S.* 105.

Exparte BROOKES.

Nov. 27.

A. being committed for a forgery, the prosecutor called on him in prison, and said he had no wish to appear against *A.*, but that the attorney concerned (an attorney of this court,) would proceed, unless his costs were paid, which the prosecutor had no means of paying: he then proposed that *A.* should advance the money; *A.* did so, and it got into the hands of the prosecutor's attorney; notwithstanding this, *A.* was put on his trial, and the prosecutor appeared against him: *A.*, however, being acquitted, applied to this court to compel the prosecutor's attorney to refund the money, putting in an affidavit of his innocence of the offence charged on him, and that he paid the money because, from his knowledge of the parties, he believed his life in danger.
The Court refused to interfere.

PELL Serjt. moved for a rule to shew cause why *Hill*, an attorney of this court, should not be ordered to pay to *Brookes*, or to the officer of the court, the sum of 140*l.*, money of *Brookes*'s, which had got into *Hill*'s possession under the following circumstances: in the *Old Bailey* sessions before the last, *Brookes* stood indicted for a forgery: some time before his trial, the prosecutor called upon *Brookes* in prison, and said that he had no wish to appear against him on the trial, but that his attorney (*Hill*) would proceed with the indictment, unless he (the prosecutor) would pay him his costs, which he was unable to do. It was then pro-

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BROOKES.

posed that *Brookes* should advance the money to cover the costs, and that the trial should not be proceeded with; *Brookes* gave 140*l.*, 50*l.* of which found its way into *Hill's* hands before the trial, and 90*l.* afterwards. *Brookes*, in his affidavit, now stated that he gave the money under the impression, from his knowledge of the parties opposed to him, that his life was in danger, though he swore positively that he was innocent of the crime of which he then stood accused, and of which he was afterwards acquitted.

DALLAS C. J. If *Brookes* has paid this money without consideration, and *Hill* has received it unlawfully, *Brookes* has his remedy at law. The court, however, will not, on all occasions, drive a party from whom an attorney withholds money, to bring his action at law for its recovery, but will interfere in a more summary manner, if it sees just grounds. Now, is the party making the application here entitled to such peremptory interference? Taking his own affidavit, what appears? — that this person has paid this money to compound a capital felony. It is almost unnecessary to say that, to compound a felony is a misdemeanour, and a very high one; and subjects the party so acting to a heavy punishment. The party here has confessed his endeavour to compound a felony, and now seeks to recover the money by means of which he attempted to commit the offence. This is the first time I ever heard such an application; and if the court were to interfere in the manner required, they would be sanctioning a very high crime. I see no claim whatever which this party has to our interference, and therefore I am of opinion that the rule must be refused.

PARK J. and BURROUGH J. expressed their concurrence in the opinion of his Lordship.

Rule refused.

DOWSE *v.* GARETT.

Nov. 28.

Horses hired to assist in dragging a stage coach up a hill, held not subject to the post-horse duty of $1\frac{1}{2}d.$ a mile, under the 57 *G.* 3. *c.* 59., and the preceding acts relating to the same duty.

THIS was an action of *assumpsit* brought by the Plaintiff, as a farmer of post-horse duties, for certain duties due to him from the Defendant, for and in respect of divers horses, &c. let to hire by the mile, to be used, and used in travelling in *Great Britain*, within the district for which the Plaintiff was farmer. There were also other counts, for horses let to hire by the stage, to be used in travelling in *Great Britain*, within the district for which the Plaintiff was farmer, and for horses let to hire for a less period than 28 successive days, for drawing, and used in drawing on public roads, carriages used for travelling post, or otherwise, where the distance at the time of the hiring was ascertained, and for horses let to hire for a less period than 28 successive days, for drawing carriages on public roads used for travelling post or otherwise, when the distance was not ascertained at the time of the hiring; and also a general count for duties on horses let to hire, to be used in travelling.

To which the Defendant pleaded the general issue.

The cause came on to be tried before *Graham* B., at the *Summer* assizes, 1822, for the county of *Warwick*, when a verdict was taken for the Plaintiff, for 28*l.* 1*s.* subject to the opinion of the Court of Common Pleas, on the following case.

The Plaintiff was the farmer of the post-horse duties for the counties of *Northampton*, *Rutland*, *Warwick*, and *Oxford*; and the Defendant, who was an inn-keeper at *Kington*, in the county of *Warwick*, was charged by the Plaintiff, as farmer of such duties, for post-horse duties to the amount of 32*l.* 5*s.* 9*d.*, in respect of two horses

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horses let by Defendant on hire, from the 15th of *November*, 1818, to the 27th of *March*, 1821, being for a period of 123 weeks, according to the following particular of the Plaintiff's demand, delivered under a judge's order.

"To the amount of post-horse duties due by the Defendant to the Plaintiff, as farmer of such duties, in respect of horses let by Defendant on hire, *viz.* two horses let on hire, to draw or assist in drawing the mail or other coach up *Edge-hill*, near *Kington*, in the county of *Warwick*, from the 15th of *November*, 1818, to the 27th of *March*, 1821, being 123 weeks, 32*l.* 5*s.* 9*d.*"

In the beginning of the year 1819, several persons entered into contracts with the superintendant of mail-coaches, to run the *Kidderminster* mail-coach through *Birmingham* and *Banbury* to *London*, and Mr. *Charles Whyatt* of *Banbury*, contracted to work it from *Kington* to *Banbury*, the coach carrying four inside and three outside passengers; the distance from *Kington* to *Banbury* is twelve miles and a half, the road passes over *Edge-hill*, which is about three miles from *Kington*, exceedingly steep, and about three quarters of a mile long, and the whole stage was to be performed in one hour and fifty minutes. The Defendant being duly licensed to let post-horses, agreed with *C. Whyatt* to furnish him weekly with two additional horses, to hook on before the leaders, to assist in drawing the mail-coach up *Edge-hill*, at the rate or charge of one guinea *per* week. The Defendant did accordingly, but with some exceptions, (when he happened not to have any horses at liberty) from the 15th of *March*, 1819, to the 27th of *March*, 1821, furnish weekly such additional horses, and received from *C. Whyatt* one guinea *per* week for the use of such horses, and a man to drive them. Such additional horses were sent to the bottom of *Edge-hill*, to await the arrival of the coach, except when there happened

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happened not to be time to send them thither, and then they were put on to the coach at *Kington*, and they were always taken off at the top of the hill. The horses so furnished were sometimes horses used by Defendant as post-horses, and sometimes they were his cart-horses, as it might happen to be convenient to him at the time: the coach, to assist in drawing which the two horses in question were used, was a public stage-coach, and was drawn by four horses, carried the mail, and was licensed to carry passengers. *Edge-hill* being very steep, and the road up it very bad, the coach could not, without distressing the regular team of horses drawing it, have arrived at *Banbury* within the limited time, without the assistance of two additional horses up the hill.

The question for the opinion of the Court was, whether, upon the construction of the several acts of parliament regulating the post-horse duties, the Plaintiff was entitled to recover? If the Court should be of opinion that the Plaintiff was entitled to recover, then the verdict was to stand, otherwise a nonsuit was to be entered.

The case turned on the construction to be put on the following enactments in 25 *G.* 3. *c.* 51., 44 *G.* 3. *c.* 98., and 57 *G.* 3. *c.* 59. By the 25 *G.* 3. *c.* 51., intituled, "An act for repealing the duties on licences taken out by persons letting horses for the purpose of travelling post, and on horses let to hire for travelling post and by time, and on stage coaches, and for granting other duties in lieu thereof; and also additional duties on horses let to hire for travelling post and by time:" after a recital of other previous acts, and a repeal of certain duties granted by the same, it is enacted, (a) "That for and in respect of every horse hired by the mile, or stage to be used in travelling post in *Great Britain*, there shall be charged a duty of 1½*d.* for every mile

(a) *s.* 4.

such

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such horse shall be hired to travel post; and that for and in respect of every horse hired for a day, or any less period of time, for drawing on any public road any coach or other carriage used in travelling post, by whatsoever name such carriages are or hereafter may be called or known for or in respect whereof any rates or duties now or heretofore under the management of the commissioners of excise, are or have been made payable by any statute or statutes now in force, there shall be charged, if the distance shall be then ascertained, the sum of $1\frac{1}{2}d.$ *per* mile, and if the distance shall not be ascertained, there shall be charged the sum of 1*s.* 9*d.* for and in respect of each horse so hired, such duty to be paid by the person or persons by whom such horse shall be so hired; that (*a*) all and every post-master, inn-keeper, or other person licensed as aforesaid, who shall let any horse on hire by the mile or stage, to be used in travelling post, shall, by themselves or servants, previous to the using such horse or horses, ask, demand, and receive for the use of his majesty, his heirs and successors, of and from the person or persons hiring the same, the sum of $1\frac{1}{2}d.$ *per* mile, for each mile such horse shall be so hired to travel, at and after the rate or number of miles which he, she, or they shall charge such traveller or travellers, for the stage or distance such horse may be hired to go; and shall, at the same time he or she receives payment of the duty for such horse or horses, deliver or cause to be delivered to the person hiring such horse, one or more of the stamp-office tickets thereinbefore mentioned, as occasion shall require, with the name of the sign of the house, his or her name, the name of the city or place where such licensed person resides, and the name of the town or place where such horse shall be hired to go; that (*b*)

(*a*) *s.* 15. (*b*) *s.* 19.

post-

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postmasters, &c. letting out horses to travel by the day or less period of time, shall receive, for the use of his majesty of the person hiring them 1½*d.* for every mile such horse is to travel, or 1*s.* 9*d.* for each horse, where the distance shall not be ascertained, and shall deliver to them stamp-office tickets, properly filled up; that (*a*) every horse hired for the purpose of drawing any carriage for any less period than two successive complete days, shall be deemed, for the purpose of this act, to be hired for a day, and shall be subject to all the same rules, regulations, and restrictions, as horses hired for a day or less period of time, for drawing such carriages as aforesaid, are by this act made liable and subject to: that (*b*) every postmaster who shall take the hire for horses travelling post shall be accountable for the duty: that (*c*) all horses hired by the mile or stage shall be deemed hired to travel post.

By 44 *G.* 3. *c.* 98. schedule (B.)

	s.	*d.*
Every horse, mare, or gelding, hired by the mile or stage, to be used in travelling in *Great Britain*, for every mile such horse, &c. shall be hired to go - - -	0	1½
Every horse, &c. hired for a less period of time than 28 successive days, for drawing on any public road any coach or other carriage, used in travelling post or otherwise, by whatsoever name such carriage now is or may be hereafter called or known, if the distance, at the time of hiring such horse, &c. shall be ascertained, for every mile such horse, &c. shall be hired to travel -	0	1½
Every horse, &c. so hired as last above mentioned, in any case where the distance shall not, at the time of such hiring be ascer-		

(*a*) *s.* 25. (*b*) *s.* 31. (*c*) *s.* 42.

tained,

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	s.	d.
tained, for each day for which such horse, &c. shall be so hired - - -	1	9
Every carriage with two or more wheels, by what name soever any such carriage now is or hereafter may be called or known, which shall be employed as a public stage-coach or carriage, for the purpose of conveying passengers for hire to or from different places in *Great Britain*, and which shall be licensed for carrying not more than four inside passengers, (children in lap excepted,) for every mile any such carriage shall travel	0	2
Which shall be licensed for carrying more than four, but not more than six inside passengers, for every mile any such carriage shall travel - - - -	0	2½
Which shall be licensed for carrying more than six, but not more than eight inside passengers, for every mile any such carriage shall travel - - - -	0	3½
Which shall be licensed for carrying more than eight, but not more then ten inside passengers, for every mile any such carriage shall travel - - - -	0	4
Which shall be licensed for carrying more than ten inside passengers, for every mile any such carriage shall travel - -	0	5

By 57 *G.* 3. *c.* 59., intituled "An act for letting to farm the post-horse duties, and for better securing and facilitating the recovery of the said duties," it is enacted (*a*), that the provisions of the 25 *G.* 3. *c.* 51., respecting hirings for a day, and for any less period than two successive days, shall be applied to hirings

(*a*) *s.* 9.

for

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for less than 28 days; that (*a*) from and after the 31st of *January*, 1818, where any person or persons so licensed as aforesaid, shall let to hire by the mile or stage, any horse, &c. to be used in travelling, and shall charge the person or persons hiring the same, a specific sum of money for the whole stage or distance which the same shall be hired to go, and not after the usual rate *per* mile, the person or persons letting such horse, &c. shall be accountable for one-fourth part of the sum of money so to be charged by him, her, or them, as and for the duty imposed by the 44 *G.* 3. in such case, and shall deliver to the person or persons hiring such horse, &c. the like stamp-office ticket, as if the same had been charged for *per* mile, and shall add thereto the specific sum charged for the same; and the person or persons letting such horse, &c. shall also enter into his, her, or their stamp-office weekly account, one-fourth part of the sum so to be charged as aforesaid, as and for the duty payable in respect of such horse, &c. and shall pay the same accordingly to the collector or collectors, who shall be authorised to receive the said duties; and if any such licensed person or persons shall refuse or neglect so to do, he, she, or they shall, for every such offence, forfeit and pay the sum of 10*l.*

Lens Serjt. for the Plaintiff. First, the contract between the Defendant and *Whyatt* amounts to a hiring of the horses in question for a stage, according to the letter and intent of 25 *G.* 3. *c.* 51. *s.* 4. There is nothing in that act from which it can be inferred that the word stage is employed in any narrow or technical sense, but it rather appears that in all cases it must depend upon the contract of the parties: wherever, in

(*a*) *s.* 16.

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such contract a beginning and ending is specified, that is a travelling by stage, and the language of Lord *Ellenborough*, in *White* v. *Beazley* (a), seems conclusive on this point: "If upon the letting to hire, there be a *terminus a quo*, and a *terminus ad quem*, specified, it is a hiring for that space, and a hiring by the stage is a hiring for a given space." That a stage does not necessarily mean the interval at which carriages are supplied with fresh horses, appears from *Fuge* v. *Cockram* (b); and if, according to *Littleton*, a tenant for half a year is a tenant by the year (c), a letting for less than a mile is a letting by the mile. However, under the 44 *G.* 3. *c.* 98. schedule (B), for a stage consisting of ascertained miles, there is one mode of charging; for a distance not ascertained, another; and on a road meted out by mile-stones, every space less than a mile may be considered as a distance not ascertained; but at all events, the 57 *G.* 3. *c.* 59. *s.* 16., removes every difficulty, and clearly applies to contracts such as the present, by which the owner of the horses has charged the person hiring the same a specific sum of money for the whole stage or distance, and not after the usual rate *per* mile, and having done this, he must be accountable for one-fourth part of the sum so charged.

Lawes Serjt. for the Defendant. First, in order to render a party liable to the duty under these acts of parliament, there must be a hiring and a travelling. There must be, even according to 57 *G.* 3. *c.* 59. *s.* 16., a hiring for each stage on which the duty is charged. Now admitting that three-quarters of a mile can be deemed a stage, here there was no hiring for that stage, but a contract for the use of horses by the week. There must be also a travelling: for the owner

(a) 1 *B. & A.* 166. (b) 1 *Price's Rep.* 317. (c) *Litt. s.* 67.

of

of the horses is obliged to give the traveller hiring them a ticket to deliver at the first turnpike gate. Now where there is no traveller, it can scarcely be contended there is a travelling: but these horses were hired to assist in conveying the mail, and they might frequently proceed without any passengers or travellers whatever. Secondly, no duty attached here because the distance for which the horses were engaged was less than a mile; and all the statutes impose a sum *per* mile, "*for* every mile such horse shall be hired to go." The common law doctrine of *Littleton* touching a holding by the year, cannot apply in the strict construction of a statute imposing a tax. Thirdly, and mainly, the duty does not attach here, because these horses were engaged in drawing a stage-coach. Taking all these statutes as in *pari materiâ* it appears to have been the object of the legislature to impose a tax on travelling. This tax is levied in different ways to meet the various modes by which persons who travel are conveyed, but it never was intended to impose two duties on the same journey. For those who travel post, the owner of the horses hired pays a duty of 1½*d.* a mile, on every horse hired. For those who travel by stage-coaches, the coach proprietor pays 2*d.* a mile on every coach carrying not more than four inside; 2½*d.* on a coach with six inside, and so on in proportion. But his payment is made with relation to the number of passengers, and is altogether independent of the number of horses he employs; whether he drives two horses or six horses for a whole stage, he pays no more than 2*d.* a mile on a four-inside coach: and if this be the law as to a whole stage, why should it be otherwise as to part of a stage? If the proprietor pays no more than 2*d.* when he employs his own horses, why should he pay more where he hires horses of another? and yet he will pay more if a duty be also exacted from that other for letting such horses, since the latter must regulate his

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bargain according to the charges with which it is incumbered. The coach proprietor, in turn, must regulate his fares according to the expence at which he obtains his horses; so that the tax on the hired horse falls ultimately on the passenger, who would thus pay 5*d.* a mile or more, when the legislature intended to charge him with no more than 2*d.* or 3*d.*

Lens in reply, argued that this was not a tax on travelling, but on the several and distinct profits of the coach proprietor, and letter of horses; and the circumstance that it ultimately fell on the traveller, in the shape of a double duty for the same journey, afforded no inference that such was not the intention of the legislature. There were many other instances in which double charges were made in respect of the same subject matter.

PARK J. now delivered the judgment of the court. When this case was presented to our notice, it was conceived, and so argued in the outset, that under the circumstances stated, *Garett* the Defendant was liable to pay the post-horse duty for the horses he supplied to draw the mail-coach up *Edge-hill*, its own usual complement not being deemed sufficient for that purpose.

It was supposed, in the beginning of the argument, that the case turned upon the 25 *G.* 3. *c.* 51., which imposed a duty of 1½*d. per* mile for every horse used in travelling post in *Great Britain*: upon the 41 *G.* 3. *c.* 98. which imposed a similar duty on every horse, mare, or gelding, hired by the mile, or stage, to be used in travelling (leaving out the word *post*) in *Great Britain*, for every mile such horse, &c. shall be hired to go: and for every horse, &c. so hired, where the distance at the time of hiring, shall not at the time of such hiring

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be ascertained, 1*s.* 9*d.*; and again, upon the 57 *G.* 3. *c.* 59., by which it was enacted, that where any persons shall let to hire by the mile, or stage, any horse, &c. to be used in travelling, and shall charge the person or persons hiring the same, a specific sum of money for the whole stage or distance which the same shall be hired to go, and not after the usual rate *per* mile, the person so letting shall be accountable for one-fourth part of the sum of money so to be charged by him as for the duty imposed upon him by this act.

If this case had rested upon these clauses of the statutes alone, it might have been difficult to say that a mail-coach and the horses therein employed, were not travelling: or that in the fair construction of the act, three-quarters of a mile might not be construed a *mile*, although by fair construction, the then Mr. (now Lord Chief) Justice *Abbott* thought the contrary in *White* v. *Beazley* (*a*); nor could it well have been, perhaps, contended that where the precise distance was not ascertained, but a particular sum was charged, the fourth was not payable. But upon none of these points does the Court in this case feel itself called upon to declare an opinion.

We found ourselves upon those clauses of the acts of parliament, to which our attention was not directed in the first instance; and we are of opinion, that none of those clauses of the acts, which have just been enumerated, apply to the case of stage-coaches; they are provided for by distinct and separate clauses applicable to them alone.

In common acceptation, travelling with post-horses, or travelling post, means travelling in post-chaises or post-coaches of the individual travellers; in all such cases, the charge arises upon the number of horses and

(*a*) 1 *B.* & *A.* 166.

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miles, or on the number of days, still however connected with the number of the horses.

In the 44 *G.* 3. *c.* 98. sched. (B), after stating what shall be paid for every horse, &c. hired to travel post, the distinction immediately follows, without reference to the number of horses employed, but only to the number of passengers carried; this statute, therefore, enacts, that for every coach, &c. with two or more wheels, which shall be employed as a public stage-coach or carriage, for the purpose of conveying passengers for hire to or from different places in *Great Britain*, and which shall be licensed for carrying not more than four inside passengers (children in the lap excepted), for every mile such carriage shall travel, 2*d.*; if six inside passengers, 2½*d.*; for eight inside passengers, 3½*d.*; for ten inside passengers, 4*d.*; for more than ten inside passengers, 5*d.*

But, according to the construction now contended for by the Plaintiff, these stage-coaches are not only to pay 2*d.*, 3*d.*, 4*d.*, or 5*d.* *per* mile, but are to pay 3*d.* more, because in the course of their journey six horses are necessary where four is their usual complement, although it is admitted, that if they pleased they might use six, eight, or ten horses throughout their whole journey, without any additional taxation.

It is admitted, however, that the coach-proprietor might have tacked on two horses of his own without any additional charge; but that, as the Defendant was to derive a benefit, as the owner of these horses (having no general concern with the coach), he ought to pay: but surely this is arguing in a circle, for if the owner of the horses is to pay a fourth of his receipt to government, under the 57 *G.* 3., he will not let to the coach-proprietor on the same terms; and he will include the amount of his duty in the price he lets his horses for on this particular job: thus it will become a tax upon the coach-proprietor, who, it is admitted, might have

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used ten horses of his own without additional charge; and, eventually, on the public. But we think this question does not turn on the particular arrangement between the parties, but on the great point, whether stage-coaches are liable for the number of their horses or passengers.

The argument was much pressed upon the court, as to the direction, in the statutes, how those who were travelling in post-chaises, &c. were to receive and to deliver the tickets, charging so many miles, &c.; and it was asked, how this was applicable to stage-coaches. We think much argument may be well founded upon this, to shew, that these provisions could not well apply to stage-coaches, which may often be without passengers, who could therefore neither receive nor give tickets. But upon this, also, it is unnecessary for the court to give any opinion.

The case of *White* v. *Beazley* (*a*) has been supposed to bear upon this case; with that decision we do not feel it at all necessary to differ. All that Lord *Ellenborough* and the other Judges of B. R. had to decide in that case was, whether the travelling there mentioned was a travelling at all (in some of the cases), and whether, if a travelling, it was by the mile or stage.

But this case turns upon totally different clauses of the acts from those which were under the consideration of the Court of King's Bench; and we are unanimously of opinion, that the Defendant is not liable to the duties sought to be imposed upon him by this action, and that there must be judgment of nonsuit.

(*a*) 1 *B.* & *A.* 166.

1822.

REGULA GENERALIS.

Michaelmas, 3 *Geo.* 4. *Thursday*, 7 *November*.

To prevent unnecessary expences to Plaintiffs suing in this court, in case of notice given by prisoners, of their intention to apply for their discharge, under any act made for the relief of insolvent debtors: It is ordered, That after such notice given to any Plaintiff, no prisoner shall be superseded, or discharged out of custody, at the suit of such Plaintiff, by reason of such Plaintiff's forbearing to proceed against him according to the rules and practice of this court, from the time of such notice given, until some rule or order shall be made in the cause in that behalf by this Court, or one of the Judges thereof.

And it is further ordered, That a copy of this rule shall be hung up in the *Fleet* prison, the chambers of the Judges, and in the prothonotaries' office, in the place where rules of this court are usually hung up.

R. Dallas.
J. A. Park.
J. Burrough.
J. Richardson.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED 1823.

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Hilary Term (a),

In the Third and Fourth Years of the Reign of GEORGE IV.

(IN THE EXCHEQUER CHAMBER.)

The KING v. WAIT.

Jan. 29.

The prisoner forged the name of *J. C.* to a power of attorney for selling stock, which was standing in the joint names of the prisoner and *J. C.*: The forgery having been discovered, the stock was not sold: Held, that *J. C.* was a competent witness to prove the forgery.

THE prisoner was convicted before *Bayley* J., and *Garrow* B. at the last *Old Bailey* sessions, of uttering a forged power of attorney for selling stock,

(a) *Richardson* J. was absent during this term, being confined to his house by ill health.

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which was standing in the joint names of the prisoner and *John Cox*; the power imported to be executed by the prisoner and *John Cox*, and the attestation imported that it was executed, in the presence of the subscribing witnesses, by the prisoner and *John Cox*. The subscribing witnesses proved that it was not executed by *Cox* in their presence, that *Cox*'s signature was not upon the power when they attested it, and that they believed the words in the attestation "and *John Cox*" were added after they attested. The bank ledger was produced, according to which, the stock was still standing in the prisoner's and *Cox*'s names; and the party to whom the power was granted, proved, that when he applied to sell under the power, he was not permitted. *Cox* was then called as a witness to prove the forgery and other points: he was objected to, but *Bayley* J. and *Garrow* B. thought him competent, and he was examined: he produced the probate of a will of *James Fitchew*, by which he gave some money to the prisoner and *Edward Naish*, in trust for *Elizabeth Fitchew*, for life, remainder to *Stephen* and *John Cox*: he proved that *Naish* refused to act, that the trust money was invested in the joint names of the prisoner and himself, that he never gave any power to sell, that the signature in his name was a forgery, and that as soon as he knew of it, *viz.* in three days after the date, he wrote, and sent the following letter to the accountant general of the bank:

"*Wrington*, 20th *September*, 1822.

"SIR,

"Having received information that the bank is in possession of a power of attorney, purporting to be executed by Mr. *John Wait* and myself, for the sale of stock in the 3 *per cent.* consols, standing in our names; if such be the fact, I beg distinctly to say, I have not executed any such power, nor was I privy to its execution;

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ecution. I should have sent to you express, but I understand the bank have refused to proceed in the business without hearing from me; and therefore the present mode will be sufficient to apprise you that I have not executed the power in question.

"I am, Sir,
"Your humble servant,
"*Jno. Cox.*"

(Directed)
The Accountant General,
Bank of *England*,
London.

This letter was produced by the counsel for the bank, and had upon it the country and *London* post-marks: no express evidence was given of its reaching the Accountant General, or any officer of the bank. The prisoner petitioned the crown on the ground that *John Cox* was improperly received as a witness.

The power was as follows: "Know all men by these presents, that we, *John Wait*, of *St. James's*, *Gloucestershire*, gentleman, and *John Cox*, of *Wrington*, *Somersetshire*, attorney, do jointly, and each of us doth separately for ourselves, and for the survivor of us, make, constitute, and appoint *John Underhill*, of the stock exchange, gentleman, our true and lawful attorney, for us, and in our names, and in our behalf, and also for and in the name and on the behalf of the survivor of us, to sell, assign, and transfer all or any part of 2189*l.* 17*s.* 1*d.*, being all our interest or share in the capital or joint stock of 3 *per cent.* annuities, erected by an act of parliament of the 25th year of the reign of his Majesty King *George* the Second, [entitled, an act for converting the several annuities therein mentioned, into several joint stocks of annuities transferrible at the Bank of *England*, to be charged on the sinking fund, &c.,] and by several subsequent acts: also to receive the

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consideration money, and give a receipt or receipts for the same, and to do all lawful acts requisite for effecting the premises; hereby ratifying and confirming all that our said attorney shall do therein by virtue hereof; and in case of the death of both or either of us, this letter of attorney, as to all matters and things which, after our respective decease, shall be done by our said attorney by virtue of, or under colour, or in pursuance thereof, shall, so far as the Governor and Company of the Bank of *England* are interested or concerned, be as binding upon our respective executors and administrators, as the same would have been upon us, if living, unless notice in writing of our respective deaths shall have been previously given to the said Governor and Company by our executors, or administrators, or by some person or persons interested in the property to which this letter of attorney refers, and unless such notice be given, we hereby severally covenant, promise, and engage, and bind ourselves and our respective executors and administrators, to and with the said Governor and Company of the Bank of *England*, that our respective executors and administrators shall, and and do allow, ratify and confirm, as good, valid, and effectual against them, and against our respective estates, whatsoever shall or may be done by our said attorney after our respective decease, so far as the said Governor and Company of the Bank of *England* shall or may be in any way or manner interested therein. In witness whereof, we have hereunto set our hands and seals, the twenty-second day of *October*, in the year of our Lord one thousand eight hundred and twenty-one.

" Signed, sealed, and delivered in the presence of us, by the above named *John Wait* and *John Cox*:

" *John Wait*. (L. S.)
" *John Cox*. (L. S.)

" *William Sheppard*, Stationer, *Corn Street*, *Bristol*.
" *Thomas Davis*, Auctioneer, *Corn Street*, *Bristol*."

The

The case was argued by *Campbell* for the prisoner, and *Bosanquet* Serjt. for the crown.

Arguments for the prisoner. *John Cox* was interested in the question, whether the power of attorney was forged or genuine; and therefore he ought not to have been admitted to prove the forgery.

In civil cases, the rule now adopted certainly is, that although a witness be interested in the question, if he is not interested in the event of the action, he is a competent witness (*a*): but it is equally well established, that, upon an indictment for forgery, if the witness at the time of his examination be interested in setting aside the instrument, supposing it genuine, either as against the prisoner or any other, he is not competent to prove the forgery. (*b*)

It may be admitted that *John Cox* had no interest in the event of this prosecution, but if at the moment when he was called into the witness box, he had any interest, however minute, that the power of attorney should not be his deed, he ought to have been rejected. In *Rhodes*'s case (*c*), upon an indictment for forging a power of attorney whereby stock was transferred, the person whose name was forged had not the remotest interest in the event of the prosecution, but he was held to be an incompetent witness to prove the forgery, because it was his interest that the power of attorney should not be considered genuine. The same principle, as applied to various other instruments, is laid down in *Watts*'s case (*d*), *Rex* v. *Russell* (*e*), *Thornton*'s case (*f*), *Rex* v. *Robert Rhodes* (*g*), *Bunting*'s case (*h*). In *Rex* v. *Boston* (*i*), Lord *Ellenborough*, in referring to the practice of not per-

(*a*) *Bent* v. *Baker*, 3 *T. R.* 27.

(*b*) *East's P. C.* chap. 19. sect. 63. *Bayley on Bills*, 450. 4th. ed.

(*c*) 2 *Strange*, 728.

(*d*) 3 *Salk.* 172.

(*e*) 1 *Leach, Cr. Cas.* 8. 4th ed.

(*f*) 2 *Leach, Cr. Cas.* 634.

(*g*) 1 *Leach, Cr. Cas.* 24.

(*h*) 2 *East, Pl. Cr.* 996.

(*i*) 4 *East*, 582.

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mitting a person who has an interest that an instrument should not be genuine to prove it forged, says, "Upon what principle that anomalous case was so settled, I cannot pretend to say; but having been so settled, it may be too much for judges sitting on trials to break in upon it; the anomaly can only be remedied by the legislature." And in the recent case of the *King* v. *Crocker* (a), the twelve judges held that upon an indictment for forging a promissory note, the person whose name was forged as maker was not a competent witness, even to prove that he had not paid interest on the note in the manner represented by the prisoner. So in *Hunter* v. *King* (b), *Abbott* C. J. says, "the case of forgery has always been considered an anomaly in the law of evidence."

The point to be enquired into therefore is, whether, when *John Cox* was called into the witness box, he had any interest that this power of attorney, purporting to be executed by him, should not be his deed.

There may be a grave doubt whether there was sufficient evidence that at that time the power had not been acted upon; the first witness examined upon the trial, produced a ledger of the Bank of *England*, in which the stock appeared standing in the names of *John Wait* and *John Cox*; but it did not appear to what day the ledger was made up, and a transfer of the stock, supposing the power of attorney to be genuine, might have taken place at the bank in the interval between the examination of this witness and the swearing of *John Cox*.

But assuming that the power of attorney had not been acted upon, still *John Cox*, when called into the witness box, appears to have had an interest that it should be set aside as forged; if genuine, it was then an existing valid power of attorney, under which the stock

(a) 2 *N. Rep.* 87. (b) 4 *B. & A.* 209.

might

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might have been lawfully transferred: it may not have been revocable by *John Cox*, as it was the joint power of himself and another, and it may have been coupled with an interest; but if revocable in its nature, it had not been revoked, since being under seal it could only be revoked by an instrument under seal.

The notice to the Bank of *England* is no revocation, for that is not under seal, and it proceeds upon the supposition of the power being a forgery. Though no case has been expressly decided as to the revocation of a power of attorney, yet when such a power is by deed, the revocation must have all the incidents of a deed (*a*): a submission by deed to arbitration, it is clear, can only be revoked by deed. *Vynio*'s case (*b*), *Milne* v. *Gratrix* (*c*), *King* v. *Joseph* (*d*), *Marsh* v. *Bulteel* (*e*); and Lord Coke repeatedly refers to the maxim, "*Nihil tam conveniens est naturali æquitati quam unumquodque eo dissolvi ligamine quo ligatum est.*" So that if this instrument were a mere power of attorney, being under seal, it could only be revoked by an instrument under seal: but it is more than a mere power, for it contains a covenant to the bank, that, in case of the death of the grantors of the power, their executors shall ratify any act done under the power, after the death of the grantors.

If the law touching the revocation of deeds be what is here contended for, the practice of the bank touching revocations, whatever it may be, cannot alter the law. The probability or improbability of the bank afterwards allowing the stock to be transferred under the power, is of no consequence; if it be genuine, they would, in point of law, be justified in permitting a transfer under it at any time until it is revoked by deed, and

(*a*) *Shepp. Touch.* 51.
(*b*) 8 *Rep.* 159.
(*c*) 7 *East*, 608.
(*d*) 5 *Taunt.* 452.
(*e*) 5 *B. & A.* 507.

they

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they have notice of its revocation; it is possible, therefore, if the power was genuine, that, during the very time *John Cox* was under examination, the bank might have been permitting a transfer of the stock, so that before the examination was ended, and before the power could have been revoked, the transfer might have been completed; that moment he would have been guilty of a breach of trust, and would have been answerable in a court of equity to Mrs. *Fitchew* and to *Stephen Cox*: it seems to follow, therefore, that during the examination of the witness he had an interest that the instrument should be a forgery.

Supposing that he had an opportunity of revoking the power after his examination and before the stock was transferred; till revoked, it might at any time have been acted upon; in case of an acquittal it would have been handed back to *Underhill*, the person to whom it was given, and he no doubt would have forthwith proceeded with it to the Bank of *England* and sold out the stock; but the witness knew that in case of a conviction the instrument would be impounded by the court, and no revocation would be necessary; he had, therefore, an interest that it should be a forgery from the necessity of executing a revocation of it, if it was genuine, for the revocation could not be executed without pecuniary expence, and though the amount of such expence is immaterial, the stamp alone would be 1*l.* 15*s.*

Besides, the mere execution of a power of attorney to sell trust stock, in breach of the trust, would probably render the trustee liable to be removed by a court of equity, and to the costs of a bill to be filed against him for that purpose; nor is it material, that the loss so to be incurred is only contingent. In an action against a master for the misconduct of his servant, the servant is not a competent witness, because a verdict against the master may be given in evidence in an action by the

master

master against the servant to shew what damages the master has sustained; but whether or no the master will ever bring such action, and whether he will give the verdict in evidence, are both matters in contingency.

There seems to be no doubt, therefore, that it was for the interest of *John Cox* that the power should be a forgery, and if so, all the authorities concur in deciding that he was not a competent witness to prove that it was not his deed.

Arguments for the prosecution. The exclusion of witnesses on the ground of interest in prosecutions for forgery, is an anomaly which the courts will not extend, and they will at least require that the interest alleged should be a certain, not a contingent interest.

Suppose the power in question genuine, *Underhill* would be the agent of *Cox*, and accountable to him; the power conveys no interest to *Underhill*, and deprives *Cox* of none. *Cox* could only be prejudiced by the fraud of *Underhill*, which is not to be presumed.

But the power gives no legal authority, for *Cox*'s signature is not attested by two witnesses, which is necessary to a transfer, under various acts of parliament relating to the Bank of *England*. (a) If the power convey no authority, *Cox* can in no way be affected by it. At all events the power is revocable by *Cox* at will, and therefore he is not prejudiced by its existence; he could revoke it as easily as he could give evidence against it; the paper requisite for a revocation is of no value, and if a deed stamp should be deemed necessary, the stamp acts cannot vary the general principles of law.

But this power is revocable without deed; it gives a mere naked authority revocable at will; such an authority is in fact revoked by any act inconsistent with the

(a) 52 G. 3. c. 24. s. 19.

continuance

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continuance of the will, and a writing is not necessary to effect the revocation: so that the rule *Nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eo ligamine quo ligatum est*, applies only to cases where the interest given is not determinable at will. Thus wills, though required by the statute of wills to be in writing, might before the statute of frauds be revoked orally (*a*): so though by the 12 *Car.* 2. (*b*), the appointment of a testamentary guardian must be in the presence of two witnesses, it may be revoked without witnesses: *ex parte* Earl of *Ilchester*. (*c*)

Even estates at will may be put an end to by any act inconsistent with will. If a man leaseth a manor at will whereunto a common is appendant, if the lessor put his beasts to use the common, this is a determination of the will. (*d*) And a lease of a manor must have been by deed.

As to arbitrations, they differ from the question before the Court, because they are between two parties; and some confusion has arisen from the following passage in *Fitzherbert's Abridgment* (*e*); "If the parties put themselves in award without deed, they (*d*) may discharge the arbitrators without deed, or enlarge the day without deed, by assent of them, but if the submission be by deed, it is otherwise, *per Finch*." And reference is made to the year book, *Hil.* 49 *Ed.* 3. 9. where *Finch* says nothing. But in *Vynior's* case (*f*), though the revocation was by deed, as appears by the pleadings, Lord *Coke* lays no stress on that circumstance, but states the case as if it were a mere writing, using the word *countermand*.

(*a*) 1 *Roll. Abr.* 614.
(*b*) C. 24.
(*c*) 7 *Ves.* 377. per Lord *Alvanley* and the Master of the Rolls.
(*d*) *Co. Litt.* 55. b.
(*e*) Tit. *Arbitrement*, 22.
(*f*) 8 *Co.* 159.

But

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But a letter of attorney is clearly revocable by matter in *pais* (*a*): as if a deed of feoffment and the letter of attorney to make livery be simple, and after, the feoffor *command*(*b*) the attorney to make livery upon a certain condition, and he does so accordingly, *semble*, that this is not a good feoffment but a disseisin of the feoffor, for *semble* that this is a revocation of the first letter of attorney, and then this cannot create a new power to make the feoffment without deed.

If a man make a feoffment of land in two vills, with letter of attorney to make livery, and before livery made by the attorney, the feoffor himself makes livery of the land in one vill, this is a countermand of the letter of attorney, so that the attorney cannot make livery in the other vill. (*c*)

If a man make a charter of feoffment of two acres, of which one is in lease for years, and the other in demesne, and make a letter of attorney to make livery, and after the feoffer himself make livery in the acre in demesne in the name of the whole, although the other acre which is in lease cannot pass by this, still the letter of attorney is revoked for this acre, for it appears that so was the intent of the feoffor. (*d*) In the present case, *Cox's* letter from *Wrington* was a distinct and sufficient revocation of the power.

In practice, letters of attorney are never revoked by deed, but the acting of the principal is always deemed a sufficient revocation; in this respect the custom of the bank has been invariable ever since its establishment, and it would be liable to an action, if it should make a transfer after notice. But this power must be deemed to have been executed with reference to the existing

(*a*) 2 *Roll. Abr.* 8. pl. 3.

(*b*) The expression in *Bro. Abr. Feoffment*, pl. 27. is "*par bouche, ou par parol.*" Also *Conditions*, pl. 106.

(*c*) 2 *Roll. Abr.* 12. pl. 6.

(*d*) 2 *Roll. Abr.* 12. pl. 7.

practice,

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practice, and the argument raised on the covenant contained on the power, can only proceed on the supposition that the power is not revoked. The covenant can only be of effect, if the power has not been revoked.

In *Rhodes*'s case *Heynsham* was interested, for his stock had been transferred; and it has been usual for the bank since that time to replace the stock and examine the witness. The bank are the persons affected by the loss: but if the principle now contended for were to prevail, the bank could never release the witness, or bring the offender to justice. The consequences of holding the witness incompetent would indeed be most absurd; he might be examined, if the fraud succeeded, though he must be rejected, if it failed, and the bank might be obliged to make a transfer on a suspicious instrument, if presented when time might be wanting for the formality of a revocation by deed.

The Judges delivered no opinion publicly, but the prisoner was afterwards executed.

Jan. 24.

RAWES v. KNIGHT.

A writ served in *November*, called on Defendant to appear in *June*: an admission of debt by Defendant, subsequently to service of the writ, and request of time to pay such debt, held a waiver of the irregularity.

THE writ in this case was served on the 12th of *November* last, but the notice at the foot of the writ calling on the Defendant to appear on the 13th of *June*,

Pell Serjt. last term, obtained a rule *nisi* to set aside the proceedings for this irregularity.

Lens Serjt. now shewed cause against the rule by an affidavit, which stated that when the declaration was served (on the 20th of *November*,) the Defendant admitted the debt, and craved time to pay it.

The

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The court held this to be a waiver of the irregularity, and

Discharged the rule

STEERS v. HARROP.

Jan. 28.

The circumstance that an agreement contains a provision for its being made a rule of court, will not of itself authorise the Court to take such a step.

HULLOCK Serjt. moved that an agreement entered into, in the course of this cause, by the parties in the cause and a third person, should be made a rule of court. It was not an agreement to refer matters to arbitration, and the application was not made at the instance of either of the parties in the cause, but the agreement contained a clause, providing that it should be made a rule of court.

But the Court thought they could not comply with the application, and *Hullock*

Took nothing.

DAVIS v. NORTON.

Ja.

Where a *fieri facias* is sued out after a *scire facias* on a judgment, the *fieri facias* must be grounded on the judgment in the *scire facias*, though the *scire facias* was sued out unnecessarily.

THE Plaintiff having unnecessarily sued out a *scire facias* to revive a judgment within a year after payment had been made on it, and having proceeded to judgment on the *scire facias*, in a mode which it was alleged was irregular, issued a common *fieri facias*, in which there was no mention of the judgment on the *scire facias*.

Hullock Serjt. obtained a rule to set aside the execution for irregularity.

Taddy

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Taddy Serjt. shewed cause against the rule, and there was much argument, touching the regularity in the conduct of the *scire facias*; the judgment of the Court, however, did not turn on that, but on the form of the *fieri facias*, *Taddy* contending, that as the *scire facias* had been sued out unnecessarily, the *fieri facias* was correct in referring to the original judgment, and not to the judgment on the *scire facias*.

The *Court* held otherwise, and said, that as it was impossible to ascertain on the record, to which judgment the *fieri facias* referred, the writ in its common form was clearly irregular, and the rule must be made

Absolute.

Feb. 1.

WELLARD *v.* MOSS.

In *January*, 1811, Plaintiff then serving on board a single king's ship on a foreign station, was appointed by the captain boatswain of that ship, and continued so on the 15th *October*, 1815, when the Plaintiff assigned to the Defendant prize-money, which the Plaintiff was entitled to receive when due. The warrant of the navy-board, confirming Plaintiff as boatswain, was not signed till the 26th *October*, 1815: Held, that Plaintiff was not within the operation of the acts which render void assignments of prize-money by petty officers and seamen.

An acknowlegement of the correctness of an account does not require a receipt stamp.

THIS was an action of debt, brought to recover the sum of 368*l.* 6*s.* 6*d.*, for money paid, laid out, and expended for the Defendant's use, and for money had and received by the Defendant to the use of the Plaintiff. The Defendant pleaded, first, *nil debet*, on which issue was joined. Secondly, a set off, to which Plaintiff replied the statute of limitations, on which issue was joined. Thirdly, the statute of limitations, on which issue was joined. At the trial of the cause at the sittings after last *Hilary* term at *Westminster*, before *Dallas* C. J. a verdict was found for the Defendant, subject

to

to the opinion of the Court of Common Pleas on the following case.

The Plaintiff's case consisted of an admission by the Defendant, that he had received for the Plaintiff, or on his account, the several sums of 163*l.* 18*s.*, of 123*l.* 17*s.* 6*d.*, and of 80*l.* 11*s.*, for the whole amount of which, this action was brought.

In answer to which case, as to the said sum of 163*l.* 18*s.*, evidence was offered and received, that on the 10th of *October*, 1813, an account was submitted to the Plaintiff, containing a statement of sums advanced to, and of disbursements made for the Plaintiff by the Defendant, in the whole amounting to the sum of 160*l.*, at the foot of which said account, were the following words. "I acknowledge the above account being correct, and am fully satisfied therewith." The Plaintiff signed the said account, but the account was not stamped with a receipt or any other stamp. The said sum of 163*l.* 18*s.* had been received by the Defendant by virtue of a power of attorney from the Plaintiff to the Defendant, empowering the latter to receive the Plaintiff's wages as they became due to him, as acting boatswain of his Majesty's ship *Bucephalus*.

The Defendant further gave in evidence to meet this demand of 163*l.* 18*s.* a debt of 7*l.* and upwards from Plaintiff to Defendant, not included in the above account, for money lent and advanced, and for goods sold and delivered.

Subsequent to this acknowledgment, that is to say, on the 15th of *October*, 1813, an indenture or deed of assignment of the prize money to which the Plaintiff was entitled for his services on board the said ship, for the captures of the island of *Java*, *Batavia*, and the *Palambang*, was executed by the Plaintiff to the Defendant, for and in consideration of the sum of 100*l.* At the time of signing the said deed of assignment, the

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the Plaintiff was acting boatswain of the said ship, (but without an admiralty warrant,) and was then on board the said ship. The Plaintiff was proved to have been boatswain's mate on board the said ship from the 17th of *March*, 1809, to the 18th of *January*, 1811, when he was appointed acting boatswain of the said ship, then a single ship on a foreign station, and so remained on board as acting boatswain, until and at the time of the execution of the said deed, but the warrant of the navy board confirming him, the Plaintiff, boatswain of the *Bucephalus*, was not signed until the 26th of *October*, 1813. It was also proved, that a boatswain so appointed, is treated as such, as to pay and rank, before the date of the warrant.

The Defendant received two payments of prize money, under and by virtue of the said deed, to which the Plaintiff had become entitled as acting boatswain of the said ship, the first payment being 123*l.* 17*s.* 6*d.*, and the second 80*l.* 11*s.*, making the sum of 204*l.* 8*s.* 6*d.*

The questions for the opinion of the Court were, whether the said deed of assignment was void in law, or if not wholly void, whether the same was available to protect the Defendant in the receipt of any sum of money beyond the sum of 100*l.*, being the consideration money therein mentioned, and whether the said acknowledgment ought to have been received in evidence: and the verdict was to be entered for the Plaintiff, or was to stand for the Defendant, as the Court should be of opinion, that the Plaintiff was or was not entitled to any thing; and if the Court should be of opinion the Plaintiff was entitled to recover any thing, the verdict was to stand for such sum as the Court should direct.

Vaughan Serjt., for the Plaintiff. 1st. The acknowledgment by the Plaintiff is an acquittance, and ought

to

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to have a receipt stamp. In *Jacob* v. *Lindsay* (a), a similar written acknowledgment was held inadmissible for want of a stamp, though the witness was allowed to see it to refresh his memory as to an oral acknowledgment.

But, 2dly, the assignment of prize money by the Plaintiff is not available, at any rate for more than the price paid for it. By the 45 *G.* 3. *c.* 72. *s.* 92. petty officers and seamen are deprived of the power of assigning their prize money, and a boatswain must be deemed a petty officer within the spirit of that act. But the Plaintiff was not even a boatswain, for though he performed the duties of such an officer, yet he was not legally appointed till the date of the admiralty warrant, 26th *October*, 1813. The admiralty alone could legally appoint him; and till so appointed, he was not entitled to share prize money as boatswain, *Donelly* v. *Popham.* (b)

Pell Serjt., for the Defendant, was relieved by the Court from arguing the 1st point. On the second his argument was as follows. If the Defendant was a boatswain, he was not a petty officer, for a boatswain derives his authority from a warrant, which distinguishes him from a petty officer, and he is classed by 49 *G.* 3. *c.* 108. *s.* 6., and by 55 *G.* 3. *c.* 60. *s.* 33. among those who are not to be deemed petty officers. But the Defendant not only acted as boatswain, but was legally appointed as such before he received the confirmation of the admiralty warrant; for the 49 *G.* 3. *c.* 108. *s.* 16. recognizes the power of commanders on foreign stations, to promote and appoint boatswains, and the Plaintiff being abroad in a single ship, her captain must, from the necessity of the case, be deemed a commander for this purpose; the subsequent ratification by

(a) 1 *East*, 460. (b) 1 *Taunt.* 1.

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the admiralty is a proof that the appointment was valid, and this distinguishes the case from *Donelly* v. *Popham*, where the admiral had no authority to appoint a captain. *Pill* v. *Taylor* (*a*) is in point, the principle laid down there being, that where a party is legally appointed to an office and acts in it, he is entitled to all the advantages attached to the office.

At all events, the present objection cannot be made by the Plaintiff, who claims in the character of boatswain, and who made the transfer in that character.

Vaughan in reply. The Plaintiff was only promoted by his commander, and not appointed boatswain till he received the admiralty warrant. *Pill* v. *Taylor* was a case of a custom-house appointment, which is different from an appointment by the admiralty.

DALLAS C. J. The question to be determined is, whether the Plaintiff was, at the time of the assignment, any thing more than an acting boatswain; for it is admitted he was acting; but it is urged that he was not really a boatswain till he was appointed by the admiralty warrant. Whether he was so or not depends upon the circumstances of the case, as they are affected by the provisions of the various acts of parliament relating to the subject. It being clear, then, that the Plaintiff was acting as boatswain; was he legally appointed to the rank of boatswain by a commander entitled to appoint him? As to this, the appointment, it must be observed, took place while the plaintiff was on a foreign station, where the Lords of the Admiralty could not have made the appointment in the first instance. They, therefore, not being able in such cases to make the appointment when it is required by the

(*a*) 11 *East*, 414.

service,

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service, the law has provided a remedy for the inconvenience which might be occasioned by the want of an appointment. By the 49 *G.* 3. *c.* 108. *s.* 16. it is enacted, "That when any petty officer or seaman shall be promoted by any commander-in-chief while a ship or vessel is abroad, the captain or commanding officer of the ship shall make out a ticket for the wages or pay of such petty officer or seaman, certifying that he has been actually promoted." Here, therefore, it appears that the commander-in-chief on a foreign station has a distinct power to appoint — a power applicable in the present instance; for, if the appointment was duly made, it is admitted the Plaintiff was a boatswain; and the only question then remaining is, whether the confirmation of the Admiralty is necessary to ratify such an appointment as this. Now the case does not state by whom the appointment was made; it states only that the Plaintiff was appointed, but we must presume that he was legally appointed, because nothing appears to the contrary; and though it has been urged, that unless the appointment had been legal, it would not have been confirmed by the Admiralty, I do not require to look at the appointment by the Admiralty, (which, indeed, has never been before us,) because, if the commander on a foreign station has the power to make the appointment, the subsequent appointment operates nothing. But the case of *Donelly* v. *Popham* is distinguished from the present, by the circumstance that the commander-in-chief there had not power to make a valid appointment; here he had; and as nothing appears to the contrary, I assume that the appointment was well made. Considering, therefore, all the circumstances of this case, and the provisions of the act of parliament as to appointments made on foreign stations, I think the Plaintiff was legally a boatswain at the time

 he

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he made the assignment, and, therefore, legally entitled to assign.

PARK J. On the question touching the stamp, *Jacob* v. *Lindsay* is an authority in point, and the circumstances of that case were stronger than the present as far as regards the necessity for a receipt stamp; the word used in that case being *received*; here the word is *acknowledged*. To hold that a receipt stamp is necessary on such occasions would lead to the greatest inconvenience. The other is a more important objection; but it appears clearly on the case that the Plaintiff was, at the time of the assignment, above the rank of petty officer, and therefore not affected by the acts which prohibit petty officers and seamen from making an assignment of their prize-money. In the case of *Donelly* v. *Popham* the commander had not authority to make an appointment, whereas in the present instance he had. As the case states the Plaintiff to have been appointed, we must presume he was duly appointed under the statute, which expressly refers to the circumstance of vacancies occurring on a foreign station, and the necessity of an immediate power of appointment to fill up such vacancies; and even if a commander-in-chief is the only person who has power to appoint in such cases, we are bound to presume in this instance that the appointment was duly made, nothing appearing to the contrary. If, indeed, we had nothing but the warrant of the Admiralty before us, we are not bound to consider it retrospective; but where a previous appointment is stated, we may presume that the Admiralty would not have confirmed such an appointment, unless it had been regular in the first instance. The confirmation of the Admiralty is a ratification of what was done. *Pill* v. *Taylor* is an important case on this subject; it goes the length of deciding, that though the original captain of the

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the vessel had been re-appointed, and that, with a retrospective effect, yet as he had not been actively concerned in a capture made during his suspension, the acting commander was entitled to the commander's share of prize-money.

BURROUGH J. There is nothing in the first objection; and as to the second, the answer is clear: the Plaintiff had filled the station of boatswain's mate, from which he was promoted to the rank of boatswain: a boatswain is a very necessary and efficient officer in a ship, and his duties are altogether different from those of a boatswain's mate. By the statute, he may, on foreign stations, be appointed by the commander-in-chief, and for this purpose, where the party is serving in a ship which sails singly, the captain of such ship is commander-in-chief. Are we to presume he was not duly appointed when the case states that he was appointed, and shews that the Admiralty afterwards confirmed the appointment? This would not have been done unless the first appointment had been made in conformity with the acts of parliament. The Plaintiff, therefore, was legally acting as boatswain, and entitled to make the assignment in question.

Judgment for Defendant.

1823.

Feb. 3.

HAM, Assignee of the Sheriff, *v.* PHILCOX and Another.

Practice. Entitling affidavits in action on bail-bond.

THIS was an action upon a bailbond which had been regularly assigned by the sheriff, and upon a motion made by *Hullock* Serjt. respecting some of the proceedings, a question arose, whether the affidavits in pport of the motion ought to be entitled in the iginal action, or in the action on the bail-bond, when the court held that they should be entitled, as above, in the action on the bail-bond.

Feb. 4.

In the Matter of KNIGHT and HALL.

The Court will not proceed summarily against an attorney on an affidavit charging him with an indictable offence.

IN the last term, the court on a statement by affidavit, granted a rule, calling on Mr. *Knight*, an attorney of this court, to shew cause why he should not pay over certain monies to *Hall.*

Pell Serjt. now shewed cause against the rule, when it appearing that the affidavit on which the rule had been granted, contained a charge of conspiracy against *Knight*, the court said, if that part of the affidavit had been read last term, they would not have granted the rule, but would have left *Hall* to prosecute an indictment; and the charges contained in *Hall's* affidavit being fully and satisfactorily answered, the Court, after reprehending *Hall's* conduct,

Discharged the rule with costs.

LONGRIDGE and Others *v.* BREWER.

Feb. 4.

In an action of contract, the sirname of one of three joint Plaintiffs was omitted on the record, but the Defendant had pleaded a tender, and paid money into court generally on the declaration: at the trial he attempted, and failed in the proof of a tender, when, after the objection of the omission of the sirname on the record had been taken, the jury found a verdict for the Plaintiff, damages 1*s.* to be increased to 23*l.*, if the Court should not think the omission an objection. On a motion to increase the damages accordingly, the Court declined to interfere.

THIS was an action brought by three Plaintiffs, *Elizabeth Longridge*, *Benjamin Barnett*, and *Michael Armstrong Hodgson*, on a special agreement. At the trial before *Dallas* C. J. *London* sittings, after last *Trinity* term, it appeared and was objected, that the surname of *Hodgson* had been omitted by mistake in the declaration, issue and *nisi prius* record, but it was correctly inserted in the writ of *capias ad respondendum*, and the Defendant who pleaded a tender, paid money into court generally on the record. The Defendant called witnesses to establish the tender, but failed, when the jury found a verdict for the Plaintiff, damages 1*s.*, to be increased to 23*l.* 9*s.* 5*d.*, if the Court should be of opinion that the omission on the record was not fatal.

Vaughan Serjt., on a former day obtained a rule *nisi* to increase the damages accordingly; and with respect to the omission of *Hodgson*'s name, contended that such omission could only be taken advantage of by plea in abatement: that at all events the objection was waived by the Defendant's paying money into court, and offering evidence of a tender: that these circumstances, and the insertion of *Hodgson*'s name in the writ, clearly proved that the Defendant could not have been misled. *Vaughan* cited *Dickinson* v. *Bowes* (a), *Mayor of Stafford* v. *Bolton* (b), *Boughton* v. *Frere* (c) to shew that such an error could not be in this stage of proceeding a fatal objection.

(a) 16 *East*, 110. (b) 1 *Bos.* & *Pul.* 40. (c) 3 *Campb.* 29.

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BREWER.

Hullock Serjt. now shewed cause against the rule. The Plaintiffs ought to have been nonsuited. The evidence adduced with respect to the tender, and the money paid into court, did not apply to the cause on the record, namely, in which *Elizabeth Longridge, Benjamin Barnett*, and *Michael Armstrong*, were Plaintiffs, and *Brewer* Defendant, but to a cause in which *Elizabeth Longridge, Benjamin Barnett*, and *Michael Armstrong Hodgson* were Plaintiffs, and *Brewer* Defendant, and a tender to the one set of Plaintiffs would not establish a tender to the other. The writ also applied to this latter cause, and the judge had no authority to try any cause but the cause on record. The omission of *Hodgson*'s name amounts to the same thing as the omission of the name of one of several joint Plaintiffs, which has always been held an unanswerable ground of nonsuit. The court will not, for the sake of justice, encourage this slovenliness, and assist to the utmost the party who has been guilty of it. In *Dickinson* v. *Bowes*, the party appeared by the name under which he was sued, and a distinct acknowledgment was proved. But that and the other cases cited, are cases of misnomer, and not of the entire omission of a name. The Plaintiff may, if he pleases, bring a new action.

Vaughan Serjt., in support of his rule, urged in addition to the topics he had employed before, the injustice that would be done if Plaintiffs were defeated on a mere clerical mistake, after his demand had to a certain extent been admitted by the Defendant.

The Court, however, thought they were not authorized to interfere, and *Dallas* C. J. who presided at the trial, observing that it was very doubtful, whether on the merits of the case the Plaintiff was entitled to more than the jury had given him,

The rule was discharged.

RICHARDSON *v.* FISHER.

Feb. 5.

On affidavit from a material witness that he had made a mistake in giving his testimony, the Court granted a new trial.

A NEW trial had been moved for in this case, partly on the ground, that the verdict was contrary to evidence, but chiefly on an affidavit from a material witness, that he had made a serious mistake in giving his testimony.

Vaughan Serjt. shewed cause against the rule.

Per Curiam. If there were nothing else in this case, there must be a new trial, on the important affidavit, that the witness has made a mistake.

Rule absolute.

THOMPSON and Another, Assignees of CHAPMAN, a Bankrupt, *v.* BEATSON and Others.

Feb. 5.

Defendants, who had a lien on *C.*'s ship, received from *C.*, then lying in prison, the balance due to them on account of disbursements made on the ship, and they then delivered up the ship's papers to *C.* *C.* having become a bankrupt a fortnight after this payment, (the imprisonment he was then undergoing being the act of bankruptcy,) his assignees sued Defendants for the balance so received by them. A verdict having been found for the Defendants, with leave for the Plaintiffs to move to set it aside, and enter up a verdict for the said balance,

The Court discharged a rule *nisi* to that effect, which had been moved for on the ground that the Defendants not having stipulated for the payment of their balance as a condition for the surrender of their lien, the payment ought to be considered as voluntary.

CHAPMAN, the bankrupt, was master and part owner of a ship which arrived in the port of *London*, in the month of *September*, 1820, and the

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bankrupt having addressed himself to the house of the Defendants, who were ship-brokers and agents in *London*, the Defendants received the ship and cargo under their care; they made the usual entries at the custom-house, and sundry disbursements on *Chapman's* account, to the amount of about 736*l.* The Defendants possessed themselves of all the written documents belonging both to ship and cargo; they sold a part of the cargo with the privity of the bankrupt, the proceeds of which reduced the Defendants' demand against the bankrupt to the sum of 175*l.* 6*s.*

Chapman was a trader, and committed an act of bankruptcy, by being arrested for a debt on the 16th *October*, 1820, and lying in prison till after the 19th *December*. On the 19th *December* a commission of bankrupt issued against him, on which he was declared a bankrupt, and the Plaintiffs were chosen assignees. On the 2d *December*, the Defendants stated their account with the bankrupt in the King's Bench prison, and the balance then appearing due from the bankrupt to the Defendants was a sum of 175*l.* 6*s.* On the same 2d *December*, the bankrupt paid to the Defendants the said sum of 175*l.* 6*s.* 0*d.*, for which the Defendants gave their receipt, and they at the same time gave up to the bankrupt all the documents belonging to the ship and cargo, and the bankrupt resumed his possession of ship and cargo.

At the trial before *Dallas* C. J. *London* sittings, before *Michelmas* term last, the jury found a verdict for the Defendants, but the Plaintiffs had leave to move to set this verdict aside, and in lieu thereof to enter a verdict for the Plaintiffs for 175*l.* 6*s.* 0*d.*, if the court should think the payment by the bankrupt improperly made.

Lens Serjt. having accordingly obtained a rule *nisi* to that effect, the Court stopped *Vaughan* Serjt., who

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was to have shewn cause, and called on *Lens* to support his rule, when he argued that the Defendants having a lien on the ship and papers, might have made the payment of the balance due, a condition for the surrender of them; but as they had made no such stipulation, the payment by the bankrupt must be esteemed a mere voluntary payment, and not within the exception of the statute for payments in the ordinary course of trade, or on bills of exchange; nor was the money received in ignorance of the bankrupt's situation.

But the Court thought that the Defendants having a clear lien on the ship and papers, they would not have been given up without the payment of the balance due; that the assignees standing in the bankrupt's place, could not, after obtaining the ship, and the papers, without which the ship was not saleable, turn round and divest the Defendants of the money which they might have secured to themselves, by retaining the ship in their possession.

Rule discharged.

RENNIE v. ROBINSON.

Feb. 5.

A. hired apartments by the year of *B.*; *B.* afterwards let the entire house to *C.*, who sued *A.* in an action for use and occupation for the hire of the apartments: Held, that *A.* could not impeach *C.*'s title.

THIS was an action for use and occupation of apartments in *Mary-le-bone*, brought under the following circumstances: the house which contained the apartments had been devised to a Mrs. *Williams*, and by a settlement made after her marriage, in pursuance of marriage articles, was vested in trustees for her separate use, and the power of leasing was in the trustees. But the settlement

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ment was not registered. The husband of Mrs. *Williams* let the apartments to the Defendant as a yearly tenant, under an agreement from *Williams* and his wife, but signed only by *Williams*, and afterwards made a lease of the house to the Plaintiff, in which Mrs. *Williams* did not join, and to which she refused to assent. The lease by *Williams* to the Plaintiff, recited Mrs. *Williams's* marriage settlement. *Williams* gave the Defendant notice of the transfer, and the Plaintiff demanded the rent for the apartments; notwithstanding which, the Defendant paid it to Mrs. *Williams*, and never attorned to the Plaintiff.

At the trial before *Dallas* C. J. *Middlesex* sittings after last *Trinity term*, *Williams* was called by the Defendant to shew that the house belonged to Mrs. *Williams*, and his evidence was objected to, on the ground that he could not impeach his own lease to the Plaintiff: Mrs. *Williams*, however, was admitted, and the marriage settlement was proved. To the objection that it was not registered, (the house standing in *Middlesex*), it was answered, that the settlement being recited in the lease to the Plaintiff, he could not plead want of notice, which was all the registry acts proposed to supply. The Plaintiff was nonsuited, with leave to move to set the nonsuit aside, and enter a verdict for 17*l.*, the sum due for the occupation of the house, should the Court be of opinion that the Defendant could not impeach his title.

Taddy Serjt. having accordingly obtained a rule *nisi* to that effect, citing *Arnold* v. *Revoult* (*a*), to shew the validity of the conveyance by *Williams* without his wife's joining in the conveyance,

(*a*) 1 *B.* & *B.* 443.

Pell

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Pell Serjt. now shewed cause against the rule, and contended, that though a lessee could not in any case dispute the title of his immediate lessor, nor the title of the lessor's assignee, in an action of replevin, yet that in an action of contract like the present, he might dispute the title of any person but his immediate lessor. If there was no contract, actual or implied between the Plaintiff and Defendant, this action would not lie. Had the Plaintiff, indeed, been assignee of *Williams*, he might have sued the Defendant in covenant, supposing a covenant to have existed. But the Plaintiff was merely a lessee under *Williams*, and if the legal estate in the house in question was in trustees, *Williams* could not convey to the Plaintiff, so that in no way could a contract exist between him and the Defendant.

DALLAS C. J. The Defendant has used and occupied the premises under a lease from *Williams*, and so has recognized *Williams*'s title: *Williams* then conveys to *Rennie*, and the Defendant has notice of this conveyance. *Rennie* only stands in the shoes of *Williams*, but the Defendant continues to occupy under him, and as the Defendant was not competent to impeach the title of *Williams*, neither is he competent to impeach that of *Rennie*.

PARK J. concurred.

BURROUGH J. The reversion which was in *Williams* is in *Rennie*, and the Defendant cannot controvert his title.

Rule absolute.

1823.

Feb. 5.

FISHER and Another, Assignees of CHESMER, a Bankrupt, *v.* MILLER, who has survived HENNING.

A. had, for the purpose of sale, consigned a cargo of fish to *B.*, who was in correspondence and connected with the house of *C.* *C.* had advanced money to *A.*, on an engagement from *A.* that the proceeds of the cargo of fish should be remitted by *B.* to *A.* through the hands of *C.*, in order that they might so constitute a security for the money advanced by *C.* *A.* then wrote to *B.*, telling him that the cargo of fish was *not* responsible for any advances made by *C.* Notwithstanding this *B.*, after the receipt of *A.*'s letter, remitted the proceeds to *C.*, who retained them to cover his advance. *A.* having become bankrupt, and his assignees having sued *B.* for these proceeds:

Held, that a jury was warranted in considering *A.*'s engagement as an appropriation of the cargo of fish, which he could not rescind, and not a mere order for payment of money, which could be revoked by a subsequent countermand before payment.

THE Plaintiffs sought by this action to recover 500*l.* which the Defendant had received for *Chesmer* upon the sale of a cargo of fish, and which, as the Plaintiffs alleged, Defendant had improperly paid over to the house of *M'Intosh* and *Wartnaby*, contrary to *Chesmer*'s directions.

At the trial before *Dallas* C. J. *London* sittings before *Michaelmas* term last, the state of the case appeared to be as follows.

Chesmer, who resided in *London*, was in 1814 the owner of a cargo of fish, shipped at *Newfoundland* in a vessel called the *Martha*; the Defendant *Miller* carried on business in partnership with *Henning*, at *Rio Janeiro*. Messrs. *M'Intosh* and *Wartnaby*, who carried on business in *London*, and were in correspondence and connected with the Defendant, recommended him to *Chesmer* as a proper person to dispose of any cargoes which *Chesmer* might send to *Rio Janeiro*, and Messrs. *M'Intosh* and *Wartnaby* being for premiums of insurance and otherwise considerably in advance to *Chesmer* upon certain cargoes of wine, in two ships, called the *Venus* and the *Sisters*, it was agreed, that those cargoes should

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FISHER *v.* MILLER.

be consigned to the Defendant at *Rio Janeiro*, and that he should remit the proceeds to *Chesmer*, through the house of *M'Intosh* and *Wartnaby*, by way of security for the sums advanced by them.

Things were in this state, when in *October*, 1814, *Chesmer* applied to *M'Intosh* and *Wartnaby* to advance 500*l.* more for *Thomas Morris*, who had before that time been in partnership with *Chesmer*, and was then engaged in business with his brother *William Morris*. *T. Morris* and *Wartnaby*, who were called as witnesses, stated, that *M'Intosh* and *Wartnaby* being already much in advance to *Chesmer*, were reluctant to give him further credit, till *Chesmer* promised that the proceeds of the cargo of fish, as well as of the other cargoes, should also be remitted by the Defendant through the hands of *M'Intosh* and *Wartnaby*, to be by them applied in reduction of the advance of 500*l.*; upon which *M'Intosh* and *Wartnaby*, on the 20th of *October*, 1814, advanced the 500*l.* to *T. Morris*, which they would not otherwise have done, and the amount was afterwards, on the 14th of *March* and 10th of *May*, 1815, remitted to them by the Defendant *Miller* out of the proceeds of the cargo of fish.

The Plaintiff also claimed 58*l.* 16*s.* beyond this 500*l.*

Sundry letters were then given in evidence. In one of *July* 28th, 1814, addressed by *Chesmer* to *M'Intosh* and *Wartnaby*, *Chesmer* said, "As I have always considered any business I may do with Messrs. *Miller* and *Henning*, under your guarantee, and have been encouraged therein by the respectability of your firm, I cannot have the least objection to direct those friends to remit us, on or through you, for my consignment *per Venus* and *Martha*. The *Venus* will load about 280 pipes of wine and brandy; you will do me the favour of informing me what advances you will make on this cargo, on handing over the bills of lading at a *pro ratâ*

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per pipe. The *Martha* is loading at *Newfoundland* a cargo of about 2500 quintals of fish in casks, to the address of Messrs. *Miller* and *Henning*. I expect to receive the bills of lading in *September*; as the latter come forward, and insurance is effected by you, your acceptances, as for the *Venus*'s cargo on account, and on transferring to you the bill of lading, will be a great accommodation to me; I request, therefore, you will inform me whether you can comply with my request."

In a letter, dated the 21st *October*, 1814, and addressed by *Chesmer* to *Miller* and *Henning*, *Chesmer* said, " Our friends, Messrs. *M'Intosh* and *Wartnaby*, having agreed to advance Messrs. *W.* and *T. Morris* for our account 500*l.*, on the security of our cargoes *per* the *Venus* and *Sisters*, consigned to you," " We hereby direct and empower you to pay them that sum." " The management of the sales will remain with you until Messrs. *M'Intosh* and *Wartnaby*'s demand is paid from the cargoes of the *Venus* and *Sisters*." " The security given the latter does not apply to the *Martha*'s cargo of fish, which please to observe."

Signed, " *Chesmer* and Co."

In a letter of the 1st of *January*, 1815, marked *private*, and addressed by *Chesmer* to *Miller*, *Chesmer*, after announcing the dissolution of his partnership with *T. Morris*, said, " Mr. *Morris* had no sort of interest in the cargoes of the *Venus* and *Martha*, of which the returns are legally and incontestably mine, to support my engagements and advances for the liquidation: amongst the latter are claims of Messrs. *M'Intosh* and *Wartnaby*, for their advances on the *Sisters*' account, for premiums of insurances as brokers, and for 500*l.*, which I consented to give Messrs. *W.* and *T. Morris* by an assignment on you from the net proceeds of the *Martha*

and

and *Venus's* cargoes, consigned to you; I am sure you will excuse my frankness when I tell you, that, having of myself directed you from *Spain* and *Newfoundland*, the cargoes of the *Venus* and *Martha*, without Messrs. *M'Intosh* and Co. or Mr. *Morris* having advanced one fraction on account of these cargoes, I could not avoid feeling uneasiness when I understood that your *London* friends declined any support to your house, and grounded their refusal on unliquidated sales by your concern."

A letter was also proved, bearing date the 8th of *March*, 1815, addressed by *Miller* at *Rio Janeiro*, to *Chesmer*, by which *Miller* acknowledged the receipt of *Chesmer's* letter of the 21st of *October*, 1814, (saying, "We take notice of your order of the 21st of *October*,") and also thanked *Chesmer* for his private letter of *January* 1st, 1815.

The jury found a verdict for the Plaintiff, damages only 58*l.* 16*s.*

Pell Serjt., for the Plaintiff, in the last term moved for a rule *nisi* to set aside this verdict, and to have a new trial. He contended, that *Miller* and *Henning* were *Chesmer's* agents; that it was an incontestable principle, that where a party ordered his agent to pay money, and afterwards, before the money was paid or passed in account, countermanded such order, the agent paying after such countermand, must be deemed to have made the payment wrongfully and without authority. He then urged, that it was by no means clear in the present case, that *Miller* had ever received any order to pay the 500*l.* in question to *M'Intosh* and *Wartnaby* out of the proceeds of *Chesmer's* cargo of fish. But even if they had, *Chesmer's* letter of the 21st of *October*, 1814, was a clear countermand of any such order, and *Miller's* letter of the 8th of *March*, 1815, acknowledging the receipt of *Chesmer's* letters of the

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21st of *October*, 1814, and 1st of *January*, 1815, and saying that he took notice of the order of 21st *October*, shewed that he himself considered the countermand to be complete, notwithstanding any ambiguity occasioned by the letter of the 1st of *January*, 1815.

The Court having granted a rule *nisi*,

Vaughan and *Hullock* Serjts. now shewed cause against the rule, and took a distinction between a mere order to pay, and an actual appropriation of a fund for payment. As to a mere order to pay, they admitted the principle laid down by *Pell*; but they contended, that such principle did not apply to the case of an appropriation, which they insisted a party could not rescind after he had once completed it. They then argued, that the testimony of *Morris* and *Wartnaby* established a complete appropriation by *Chesmer* of the cargo of fish, for the purpose of securing the advance of 500*l.*; that *Chesmer*'s letter of the 21st of *October*, 1814, written immediately after this appropriation, was little else than a direct fraud, but whether so or not, it could not rescind a previous appropriation of the proceeds of the cargo. They cited *Firbank* v. *Bell*. (a)

Pell, in support of his rule, contended that there had been no appropriation, and that, therefore, the verdict was contrary to evidence.

DALLAS C. J. If what the witnesses said be true, the letter of the 21st of *October* was written in violation of the agreement under which *Chesmer* had obtained the money. But the letter of the 1st of *January*, 1815, is a direct admission of that agreement; the jury had the letters and the accounts before them, and not one of

(a) 1 *B. & A.* 36.

them

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them had any doubt that the cargo of fish had been appropriated to the payment of the advance of 500*l.* I told the jury there was no doubt as to the law; that as a general principle, it was quite clear that an agent who receives orders to pay, is not justified in doing so, if before payment he receives counter orders. But I directed them to consider the correspondence and the testimony of the witnesses, and to determine whether or no an appropriation had been made. They were satisfied that such was the case, and I see no reason for disturbing the verdict.

PARK J. If *Morris* and *Wartnaby* are believed, there was an appropriation of the cargo of fish, which *Chesmer* had no power to rescind. A party who obtains money on an agreement, cannot be allowed thus to deprive the lender of the security which was stipulated for and granted, and this does not at all affect the power of a principal to countermand an order given to an agent to pay money.

BURROUGH J. After the testimony of *Morris* and *Wartnaby*, it cannot be doubted that *M'Intosh* and Co. advanced their money upon the assurance, that they should have the security of the cargo of fish; if so, that security could not be retracted. The verdict is clearly right, and the present rule must be

Discharged.

1823.

Feb. 6.

IBBOTSON v. TINDAL.

Where the Defendant was already in custody when Plaintiff's *capias* issued against him, and afterwards escaped, the Court refused to set aside an attachment against the sheriff for not bringing in the body, and to drive the Plaintiff to his action against the sheriff, which was moved for on the ground that the sheriff, having taken no bail-bond, ought not to be responsible summarily by attachment.

In the same case the sheriff, having returned to the *capias*: "I have taken the Defendant, whose body remains in the prison of, &c.;" the Court refused to allow him to amend the return by striking it out and making another according to the fact.

A WRIT of *capias ad respondendum*, returnable in three weeks of the Holy Trinity, was issued in *June* last to the sheriff of *Worcestershire*, against the Defendant, then a prisoner in the gaol of the county of *Worcester*, under an extent in aid; whereupon the sheriff lodged with the gaoler a warrant on the writ of *capias*, and informed the Plaintiff's attorney he had done so. On the 28th of *June* the sheriff being ruled to return the writ of *capias*, made a return on the writ in the words following, "I have taken the within named Defendant, whose body remains in the prison of our lord the king, under my custody," which return with the writ was duly filed. In *July*, a writ of *habeas corpus* issued out of the Court of Exchequer, directing the sheriff to have the body of the Defendant before a judge at chambers, for the purpose of shewing cause why he should not be discharged on the extent in aid: the gaoler, or some person deputed by him, accompanied the Defendant for this purpose to *London*, where he escaped without the knowledge, consent, or participation of the sheriff or under-sheriff, as it was averred in the under-sheriff's affidavit; but there was no affidavit from the gaoler. The Plaintiff then ruled the sheriff to bring in the body. And in *Michaelmas* term, *Vaughan* Serjt. obtained a rule *nisi*, calling on the Plaintiff to shew cause why the sheriff should not be at liberty to amend his return on the writ of *capias*, by striking out the return on the writ, and

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returning according to the fact, "that on the receipt of the writ by the sheriff, the Defendant was in custody at the suit of other persons, and from thence, until and at the return of the writ, at the suit of other persons and the Plaintiff:" but the Court, upon cause shewn, thinking the first return substantially correct, and that the amendment was only prayed with a view to exonerate the sheriff, discharged the rule. The Plaintiff having then sued out an attachment against the sheriff for not bringing in the body,

Vaughan Serjt. obtained a rule *nisi* to set aside this attachment, on the ground that the sheriff was innocent of this escape, and that at all events he ought not to be responsible, because the Defendant being in custody when the Plaintiff's *capias* issued, the sheriff could take no bail-bond for his security; but if the attachment were set aside, the Plaintiff might bring his action against the sheriff for the escape, in which case the amount of the damages might be enquired into, and the sheriff be thereby enabled to have his remedy over against the gaoler in case a verdict should be obtained against him.

Pell Serjt., having shewn cause,

The Court, after observing on the circumstance that the gaoler made no affidavit, and the duty of the sheriff to bring in the body when called on to do so, thought that no grounds had been shewn for thus interposing in his favour, and

Discharged the rule.

1823.

Feb. 7.

TURNER *v.* MEYMOTT.

A tenant having omitted to deliver up possession when his term had expired after a regular notice to quit, the landlord, in his absence, broke open the door, and resumed possession; though some articles of furniture remained.

The tenant having obtained a verdict against the landlord in trespass for this entry, the Court granted a new trial, holding that the landlord might so enter in such case.

TRESPASS for breaking and entering Plaintiff's house. At the trial before the Lord Chief Baron, *Guilford Summer* assizes, 1822, it appeared that the Plaintiff had been tenant of the house to the Defendant, from week to week; that he had received a regular notice to quit, but omitted to deliver up possession, whereupon, the Defendant, at a time when nobody was in the house, broke open the door with a crow-bar, and other forcible applications, and resumed possession. Some little furniture was still in the house. The Chief Baron having said that the law would not allow the Defendant thus forcibly to reinstate himself, the jury found a verdict for the Plaintiff, whereupon,

Taddy Serjt. obtained a rule *nisi* for a new trial, and

Pell Serjt. now shewed cause against the rule. The question is, whether when a tenant refuses to deliver possession after a regular notice to quit, the landlord may make a forcibly re-entry: but it cannot be permitted he should take the law into his own hands, and do that by violence which is usually accomplished by an action of ejectment. It is contrary to the first principles of law, that he should become judge in his own cause, and substitute his own strength for the ordinary civil process. If there had been resistance, and death had ensued, the crime of murder would have been committed; and it makes no difference that nobody was in the house, for the Defendant could not ascertain that till he entered, and the Plaintiff might have come up while the violence

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was in progress. Some furniture being in the house, this was not a case of vacant possession. The statute of 11 *G.* 2., which gives the landlord double value where the tenant holds over, shews what is the appropriate remedy in such cases; but that statute would be useless, if the landlord might thus take the law into his own hands. It might be urged, that if the landlord had proceeded irregularly he would be liable in an indictment for a forcible entry, but his subsequent liability would not justify the previous wrong. In *Taunton* v. *Costar* (*a*), the entry made by the landlord's putting his cattle on the ground, was entirely peaceable, and to that there could be no objection; so that Lord *Kenyon*'s observation, "that if he dispossessed the tenant with a strong hand, he would be liable for a forcible entry, but there could be no doubt of his right to enter on the land at the expiration of the term," was uncalled for by the case before him, and leads to the absurdity that, in certain cases, a landlord may enter, and yet he shall be punished for the entry. *Pell* also referred to *Davies* v. *Connop.* (*b*)

DALLAS C. J. The high respect which I entertain for my Lord Chief Baron, has alone made me hesitate a single moment, and even now, perhaps, as the cause is to go down to be tried again, I ought not to express any opinion. The question is, whether a landlord has a right to enter in the manner the Defendant did under the circumstances of this case, in which the tenant held over after his right to possession had ceased, and the landlord's right to enter had accrued. It must be admitted he had a right to take possession in some way; the case of *Taunton* v. *Costar* is in point, to shew that he might enter peaceably, and that no ejectment was

(*a*) 7 *T. R.* 431. (*b*) 1 *Price*, 53.

 necessary.

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necessary. If he has used force, that is an offence of itself; but an offence against the public for which, if he has done wrong, he may be indicted.

PARK J. I am of the same opinion. The declaration states that the Defendant broke and entered the house of the Plaintiff, but the fact was not so; the Plaintiff had gone out, and the house was not his, but his landlord's, who had a right to break his own door; as no person was within, there could be no danger to any man's life. Lord *Kenyon* says, in *Taunton* v. *Costar*, "it is clear the landlord could have justified in a plea of *liberum tenementum*. There can be no doubt of his right to enter upon the land at the expiration of the term;" and that decision, in my judgment, goes the whole length of the present.

BURROUGH J. I was once concerned at the Cockpit in a case similar to the present, where I used the same arguments as have now been urged by my Brother *Pell*, but Lord *Kenyon* and Lord *Alvanley* who were there, entertained no doubt, and said the landlord might enter. The rule for a new trial in this case must be made

Absolute.

Feb. 7.

In the Matter of PAGE.

The Court refused to strike an attorney off the rolls on the ground that he had not served a regular clerkship, and had misconducted himself previously to admission.

PAGE had been admitted an attorney of this court after considerable opposition before a judge at chambers, who thought the opposition malicious.

Hullock

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In the Matter of PAGE.

Hullock Serjt., upon affidavit, alleging that *Page* had never served a regular clerkship, and charging other matters against him, now moved for a rule calling on him to shew cause why he should not be struck off the rolls; but the affidavit did not suggest any misconduct subsequent to his admission. *Hullock*, however, contended that the Court were competent to review the circumstances under which the admission was obtained; but he adduced no instance of a similar application, and

The Court, intimating, that to support the motion, a case should have been made out of misconduct subsequent to admission, even if there had been no opposition,

Refused the rule.

THRELFALL *v.* WEBSTER.

Feb. 7.

The Plaintiff, in an action on bills of exchange, upon an affidavit that the bills had come into the Defendant's hands by fraud, and had never been satisfied, obtained a rule *nisi* for the Defendant to produce them, and permit Plaintiff to take copies. The Defendant having, by affidavit, denied the fraud and nonpayment, the Court discharged the rule.

LENS Serjt. had obtained a rule, calling on the Defendant to shew cause why he should not produce certain bills of exchange, specified in the declaration in this cause, in order that the Plaintiff might inspect and take copies of them.

The motion was made on an affidavit, that the bills had come into the Defendant's hands by fraud, (though the particulars of the fraud were not stated) and that they had never been satisfied.

On the part of the Defendant, an affidavit was put in which directly negatived the fraud, and asserted that the bills had been satisfied. Upon this,

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Bosanquet Serjt. who shewed cause against the rule, argued that the Court had not jurisdiction to compel, or at all events, when the charge of fraud was so directly negatived, would not compel the Defendant to produce instruments, the exclusive possession of which might be his only defence against an unjustifiable demand, which a knowledge of the contents of them might enable the Plaintiff to establish: that in bill transactions, the possession of the bill by the party chargeable, being considered the safest means of preventing any second demand upon it, regular receipts were seldom or never taken upon payments, and that therefore possession of the bill by the Defendant afforded the strongest presumption of its having been paid; that the Plaintiff by omitting to state the particulars of the fraud alleged, had prevented the Defendant from denying it otherwise than in a manner as general as it was charged; and that the most eminent lawyers, particularly Lord *Eldon*, while he sat in this court, esteemed summary interposition, in cases of this nature, highly inexpedient, except where the grounds for interfering were made out in the clearest manner. Such an application had, indeed, seldom if ever been acceded to, except in cases where both parties had an interest in the instrument, or the instrument required stamping; if the bill in the present instance had been paid, the Plaintiff had no interest in it.

Lens and *Vaughan* Serjts, in support of the rule, maintained that the general allegation of fraud was sufficient to support this application, and that a disclosure of the details of the fraud would lay open the whole of the Plaintiff's case. They cited *Bateman* v. *Phillips*, (a) to shew the jurisdiction of the court. Their object was not to deprive the Defendant of his defence, but merely,

(a) 4 *Taunt.* 161.

by

by setting out the bills correctly, to prevent their own failure upon any alleged variance.

DALLAS C. J. I entertain no doubt as to the jurisdiction of the Court to interpose in cases of this description; but how to dispose of them must depend on the discretion of the judges, and that, upon the circumstances of the case. Difficulties have arisen from time to time, with respect to the general question, on what ground the Courts will order an inspection of instruments to enable the Plaintiff to proceed in cases where he could not otherwise establish his claim: originally, Lord *Mansfield* held that these summary applications might generally be entertained in courts of law, to save the expence of resorting, for the same purpose, to a court of equity; but many eminent persons have entertained doubts as to the correctness of this doctrine, and that brings me to the consideration of the circumstances under which these orders have usually been made. A distinction has been drawn between cases where both parties have an interest in the instrument, and where only one is so interested. But in the present case, where the parties have an adverse interest, will the Court interfere? and will they interfere as a matter of course? if this were the practice, why does the party who makes the application, go on to say that the bills were fraudulently obtained? He evidently relies on that special ground of application; though he states it generally, and it is as generally denied. But the peculiarity of this case is, that the Plaintiff says the bills were obtained by fraudulent means from him: and if so, it is incumbent on him to state to the court the nature of the fraud. As to the general principle which regulates the interposition of the Court in matters of this kind, I wish to look into the cases before I come to any determination on the subject; but the present application appears

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appears to have been made on special grounds, which have been distinctly answered, and to those grounds I should be disposed to confine it; however, I do not decide now; my mind is surrounded by difficulties on the subject of these applications, although it has been usual to comply with them.

The decision having been thus postponed, *Dallas* C. J. this day said, "Under the special circumstances of this case, we think the rule ought to be discharged."

Rule discharged accordingly.

Feb. 7.

WEST *v.* ASHDOWN and PALFREY, Bail of PRICE.

The principal offered to surrender on the 13th of *May*, but the Plaintiff gave him time, and dispensed with the surrender, on an understanding that the bail should continue liable. On the 11th *June* the bail, ignorant that the Defendant had offered to surrender, signed an agreement to continue liable; the principal always declared himself ready to surrender; but in *Trinity* vacation the Plaintiff, without notice, issued proceedings against the bail, returnable in *Michaelmas* term. On the 29th of *October* the principal obtained his certificate under a commission of bankruptcy: Held, that the bail were discharged.

ON the 7th *May*, 1822, the Plaintiff lodged with the sheriff of *Worcestershire*, for the purpose of charging the bail in this cause, a *capias ad satisfaciendum* against *Price*, returnable in five weeks from *Easter* day. On the 13th of *May*, *Price* offered to the Plaintiff's agent to surrender in discharge of his bail, and expressed a determination that they should not charged, but an arrangement being proposed touching the sale of some of *Price*'s property, the Plaintiff's agent agreed to dispense with his surrender for six weeks, upon an understanding that the bail should remain liable, and the following agreement was afterwards entered into, the bail being ignorant that the Defendant had offered to surrender.

"On Messrs. *Brace* and *Selby*, on the part of the Defendant, undertaking that the bail should not be discharged

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charged from their present liability, I, *George Hil* attorney, or agent for the said Plaintiff, do undertake to stay all further proceedings for 6 weeks from the 18th instant; and we, Messrs. *Brace* and *Selby*, attornies, or agents for the said Defendant and his bail, do hereby undertake, that in consideration of the Plaintiff suspending all proceedings against the bail of the said Defendant as aforesaid, their liability shall continue; witness the hands of the said *George Hill* and *Brace* and *Selby*, this 23d *May*, 1822.

" *George Hill*,
" *Brace* and *Selby*,
acting as the attornies on this occasion.

" We, *Samuel Palfrey* and *John Middleton Ashdown*, the bail of the above named Defendant, do hereby consent to our liability continuing in manner above said, dated this 11th day of *June*, 1812.

" *Jn. M. Ashdown.*
" *Saml. Palfrey.*"

On the 4th of *July*, a commission of bankrupt was issued against *Price*, upon which he afterwards obtained his certificate the 29th *October*, but the Plaintiff never proved under the commission.

The 6 weeks mentioned in the agreement, (which 6 weeks embraced the whole of *Trinity* term,) expired without *Price*'s surrendering in discharge of his bail, though he was always ready and willing to do so, if notice had been given of the Plaintiff's intention to proceed, which notice *Price*'s attorney was induced to expect from the conduct of the Plaintiff's agent; but the Plaintiff, without further notice to any of the parties, issued a *scire facias* against the bail in *Trinity* vacation, returnable in *Michaelmas* term last, and the bail having made default, judgment was then signed, and a *fieri facias* issued against them. The bail then obtained an order from *Park* J. to set aside the proceedings on the

bail-

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bail-bond, on payment of costs, on the ground of *Price's* having become a bankrupt, and obtained his certificate; but no rule was to be drawn up upon the order, till the 5th day of this term.

Vaughan Serjt., on that day, obtained a rule, calling on the Defendants to shew cause why the order made by Mr. Justice *Park*, should not be set aside. He insisted that the time given *Price* to surrender, was on the express condition that the bail should continue liable, and that they had ratified this by the engagement which they afterwards signed. On the day that agreement was signed, the *ca. sa.* against *Price* had been returnable 8 days in full term, so that the bail were completely fixed, and the 6 weeks time allowed was merely an indulgence to them, the better to enable them to produce the money. If *Price* had died after the expiration of the 8 days, the bail could have had no relief. In *Harmer* v. *Hagger*, (a) the principal obtained his certificate before the *ca. sa.* was issued, and in *Mannin* v. *Partridge*, (b) the commission of bankrupt against the principal was sued out before judgment was obtained against him. Independently of the agreement signed by the bail, this case seemed to differ from all the others, but at all events the agreement was conclusive against them.

Pell Serjt. for the bail, argued that upon the Plaintiff's giving the Defendant time to surrender, on the 13th of *May*, the bail were absolutely discharged; the agreement, therefore, signed by them on the 23d of *May*, was a nullity, for want of consideration. They undertook to continue to incur their then existing liability; and that liability amounted to nothing. Besides, after the principal's repeated declarations of his

(a) 1 *B. & A.* 332. (b) 14 *East*, 599.

willingness

willingness to surrender, the proceeding against the bail without notice was a breach of good faith.

Vaughan and *Peake* Serjts., were heard in support of the rule.

Sed per Curiam. The bail ceased to be liable on the 13th of *May*, when the Defendant's surrender was dispensed with, and they could not become liable afterwards by the agreement which they entered into in ignorance of the circumstance that the Defendant had offered to surrender, or of the effect of the Plaintiff's having allowed him time. This is like the case of a cognovit, on which time is given to the principal.

The proceeding against the bail without notice, after the principal had expressed his readiness to surrender at any time, was a breach of good faith which the Court cannot countenance; the rule therefore must be made

Absolute.

CROOK *v.* M'TAVISH.

Feb. 8.

An officer in the preventive service boarded a ship on the 23d of *August*, and left three armed men on board, but did not then determine on detaining her as a seizure; on the 25th he decided on seizing her, and detained her till the 24th of *September*. The owner having sued him for this seizure and detention: Held, that the time within which the action should have been commenced under 28 *G.* 3. *c.* 37. (three months after the matter or thing *done*,) must be computed from the 23d of *August*.

ACTION against an officer in the preventive service, for an alleged unjustifiable seizure and detention of the Plaintiff's ship.

At the trial before *Richards* C. B., *Maidstone* summer assizes, 1822, the Plaintiff's mate proved that the Defendant boarded the ship on the 23d of *August*, 1821, but did not then determine on detaining her as a seizure; however,

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however, he left 3 armed men on board, and on the 25th of *August*, came on board again, and ordered the ship to *Dover*, where she was put under quarantine. She remained under quarantine till the 8th of *September*, but was not liberated from detention till the 24th of *September*, 1821.

The Plaintiff's solicitor proved that notice of action was served on the 15th of *October*, 1821, and the writ of *capias* issued on the 17th of *November*, 1821.

It was then objected on the part of the Defendant, that the writ was sued out too late; that under the 28th *G.* 3. *c.* 37., the writ must be sued out within three months after the matter or thing done, and that in this case, the thing complained of was done on the 23d of *August*.

The Chief Baron was of this opinion, and directed a nonsuit, reserving it to the Plaintiff to move and set the nonsuit aside.

Taddy Serjt. in the last term, accordingly moved for a rule *nisi* to set aside this nonsuit, and have a new trial, on three grounds. 1st, that the Plaintiff having been put under quarantine by the act of the Defendant, was in effect a prisoner, unable to communicate with the shore till the 8th of *September*, and therefore entitled to reckon the 3 months from that day.

2dly. That he was entitled to reckon the three months from the completion of "the thing done or committed;" and if so, he had three months from the 24th of *September*, when the detention was abandoned, or at all events, three months from the 25th of *August*, before which day the thing could not be said to be done, as the Defendant had not determined upon seisure.

3dly. That by the construction of the 28 *G.* 3. *c.* 37. he was entitled to three calendar months within which to commence his action, and if so, the writ was sued out in time,

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time, even reckoning from the 23d of *August*. A rule *nisi* having been granted;

The Court this day stopped *Onslow* Serjt., who was to have shewn cause against the rule, and called on *Taddy* to support his rule, having first excluded the objection touching the quarantine; that objection not appearing on the Chief Baron's report to have been made at the trial.

Taddy. By the 28 *G.* 3. *c.* 37. *s.* 23., which applies to the case of the Defendant, the action must be commenced within three months next after the matter or thing done. Now this must mean the whole thing done, and not a part only: it must mean the completion of the thing, and not the commencement; otherwise this injustice might follow, that if the thing done should continue for three months, or more, and the greatest amount of injury should accrue during the last month of the three, the Plaintiff would be deprived or delayed of his remedy for the weightier injury, and could recover damages for no more than two months, because he must give a month's notice before commencing his action. Besides, it is an established principle, that every continuation of a trespass or detention is in itself a fresh act, which the party aggrieved may take as the substantive ground of his complaint. By the 24 *G.* 2. *c.* 44. *s.* 8. it is enacted, that no action shall be brought against any justice of the peace for any thing done in the execution of his office, unless commenced within six calendar months *after the act committed.* Now the expression *after the act committed* can scarcely be said to differ in meaning from the expression *after the matter or thing done;* and yet in *Pickersgill v. Palmer* (*a*), it was holden, that if a man be imprisoned by a justice's warrant on the 1st of *January*, and kept in prison till

(*a*) *Bull. N. P.* 24.

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the 1st of *February*, he may bring his action within six months after the 1st of *February*; for the whole imprisonment is one entire trespass.

So in *Massey* v. *Johnson* (*a*), the Court held that the magistrate was liable to answer in an action for such part of an imprisonment suffered under his warrant as was within six calendar months before the action commenced against him. The case of *Godin* v. *Ferris* (*b*) is distinguishable from the present; for the act of parliament on which that decision proceeded enjoins that the action shall be brought within three months after *the cause of action shall arise*, as well as after the thing done or committed; besides, in that case, the detention of the thing after the three months, and up to the time within which he sued, was occasioned by the act or omission of the Plaintiff himself, he having omitted to execute a writ of delivery which would have restored to him the thing detained.

But, at all events, the Plaintiff in this case is entitled to reckon his three months from the 28th of *August*; because, even abandoning the detention, the act of seizure was not determined on, or carried into effect till that day.

The *Court*, however, relied on *Godin* v. *Ferris*; and expressed a decided opinion, that the three months must be computed from the 23d of *August*, when the Defendant made a seizure by stopping the Plaintiff's ship in her voyage, and putting three armed men on board.

They then desired that the question touching computation by lunar or calendar months, should be turned into a special case, and argued hereafter, suspending judgment till that point should have been decided.

(*a*) 12 *East*, 67. (*b*) 2 *H. Bl.* 14.

WILLIAMSON *v.* Sir GEORGE GOOLD.

Feb. 10.

An annuity being in arrear, and the rents of an estate on which it was secured being unpaid, the trustee of the estate, who had negociated the annuity between the grantor and grantee having advanced a sum to the grantee in anticipation of the coming rents, and having received from the grantee on this advance the commission which he usually received on annuity payments, the Court set aside an execution which (the rents proving insufficient) was afterwards issued for this sum in the name of the grantee, against one who, as surety for the payment of the annuity, had given a warrant to confess judgment.

BY indenture of the 22d of *December*, 1813, between *Henry Michael Goold*, of the first part, *Thomas Williamson* (the Plaintiff) of the second, several other persons named in the schedule of the indenture of the third, *Edward Howard* of the fourth, and *Richard Cooke* of the fifth, *Henry Michael Goold*, in consideration of 4130*l.*, granted to *Williamson* on behalf of himself, and in trust for the persons named in the schedule, of the indenture, an annuity of 590*l.*, and secured it on estates in *Ireland*, which, subject to prior annuities, were conveyed to *Howard* in trust, and *Cooke* was appointed receiver. By indenture of covenant of the same date, Sir *George Goold* (the Defendant), then *George Goold*, Esq., entered into a covenant binding himself and his heirs for the payment of the said annuity to the said *Thomas Williamson*, from and immediately after default should be made in payment thereof by the said *Henry Michael Goold*, his heirs, executors, or administrators. He also executed a warrant of attorney, to confess a judgment as a farther security for the said annuity; and the judgment was to be put in force as often as any default should be made by the said *Henry Michael Goold*, his heirs, executors or administrators, in the payment of the annuity.

The estates proving insufficient to discharge even the prior annuities, no part of this annuity was paid by *Henry Michael Goold*, or Sir *George Goold*, after *December* 1814.

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In 1815 Sir *George Goold* went abroad, and continued out of *England* till *November* in the last year. *Williamson* and the other annuitants becoming exceedingly distressed and urgent for payment, *Howard* and his partner, *Gibbs*, out of their own funds, advanced them various sums of money, in anticipation and on the security of the annuity, and in reliance on Sir *George Goold's* guarantee. At the respective times of these advances, *Howard* and *Gibbs* deducted and retained a commission of 2½ *per cent.* thereon, as they were accustomed to do upon payments of annuities passing through their hands. In *June* 1817, and *May* 1818, *Henry Michael Goold* was discharged from prison, under the insolvent debtor's act, and the arrears of this annuity from *December* 1814 formed one of the debts mentioned in his schedules. When Sir *George Goold* returned to *England* in *November* last, he was taken in execution, under the judgment confessed to the Plaintiff *Williamson*, for 4497*l.* 10*s.* 9*d.*, the arrears of the annuity since 1814, besides sheriff's poundage, &c. But the Plaintiff had received from *Howard* and *Gibbs*, since 1814, by way of advance as above, 3213*l.* *Howard* and *Gibbs* having become bankrupt, their assignees gave Sir *George* notice that the bankrupts had advanced this latter sum to the Plaintiff *Williamson*, on the credit or security of the annuity, and therefore required Sir *George* not to pay any part of the 3213*l.* to the Plaintiff, or to any person but the bankrupts' assignees.

Lens Serjt., on a former day, upon affidavits stating the foregoing facts, obtained a rule, calling on the Plaintiff to shew cause why the writ of execution should not be set aside, on payment of the balance due to the Plaintiff, and the costs, fees, &c., incidental to such balance only.

Vaughan

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Vaughan and *Pell* Serjts. now shewed cause against the rule on the part of the Plaintiff, and *Taddy* and *Hullock* Serjts. on the part of the assignees. The Defendant is liable for any default made by his brother in the payment of the annuity; and this rule cannot be made absolute unless it be shewn that the sum of which the Defendant seeks to be discharged has been paid either by himself or his brother, or the estate on which the annuity is secured. But it is not pretended that the payment has been made either by one or the other, or that *Howard* and *Gibbs* ever received any rent towards such payment. If neither the Defendant nor his brother have paid, where is the hardship or illegality of his being now charged? He could only claim to be discharged, in case the same sum had been required of him or his brother a second time. It is true, a sum has been advanced by *H.* and *G.* to the annuitants; but this is an arrangement between those parties, to which the Defendant and his brother are altogether strangers, and as little entitled to profit by it as by any other loan which might be made by *H.* and *G.* If the money paid by *H.* and *G.* had been a payment on account of the Defendant or his brother, *H.* and *G.* might sue them in debt for money paid to their use; but it is quite clear that *H.* and *G.* can bring no such action. In order to sustain debt, there must be a contract express or implied between the parties. An express contract is out of the question here, for the money was advanced by *H.* and *G.* without the knowledge or consent of the Defendant or his brother; and it is equally impossible to imply a contract where the money was advanced without authority, and the person sought to be charged might, if he pleased, repudiate the advance; indeed, as his estate had been made a security for the annuity, he would naturally expect that no such advance could be called for. Nei-

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ther could *H.* and *G.*, after receiving from the annuitants a commission of two and a half *per cent.* on the advance, recover the money advanced back from them as money paid without consideration, in the event of the Defendant's brother's estates proving an inadequate security, so that *H.* and *G.* and their creditors are entirely without remedy, unless they can stand in the shoes of the Plaintiff; and it is clear that they are entitled to do so. By the transaction between himself and *H.* and *G.* the Plaintiff does in effect assign to *H.* and *G.* the Defendant's debt; and there is no authority to shew that such an assignment may not take place as well by parol as by deed. If the Plaintiff so assigns, he also empowers *H.* and *G.* to employ his name in legal process, in case such a step should be necessary; for it is an undisputed principle, that where property is transferred, all means to render the property available are also transferred with it: so that *H.* and *G.* are in the same condition as the assignees of a bond, who cannot sue the obligor in their own name, but with whom it is the universal and recognized practice to sue in the name of the obligee. Here, therefore, a regular judgment has been entered up, and execution has issued in respect of a sum which has never been paid by the Defendant or his brother; and the Court cannot exercise an equitable jurisdiction, merely because the creditor may have received his debt from a party, and by means, to which the debtor is an entire stranger. In *Butt* v. *Conant* (*a*), the Plaintiff was in execution for costs due from him to the Defendant; but this Court would not discharge him because the Defendant had received the amount of the costs from the treasury. In the present case, *H.* and *G.* were not agents to the Defendant or his brother; but, in the

(*a*) 3 *B.* & *B.* 3.

matter

matter of the advance to the Plaintiff, as much a stranger as the treasury was with respect to *Butt*. It is clear that this was so in the estimation of the principal, *Henry Michael Goold;* for when he was discharged under the insolvent debtor's act the sum now in dispute was enumerated in his schedule as a debt due to *Williamson*.

Lens and *Cross* Serjts., in support of the rule. The Defendant is only liable in case of default in the payment of the annuity: but with respect to the sum in dispute, there has been no default; because though it was not actually paid by the Defendant or his brother, it was paid on account of the annuity, and, therefore, on their behalf. That it was paid on account of the annuity, and was not a mere advance or substantive loan by *Howard* and *Gibbs*, is clear from the circumstances that *Henry Michael Goold*'s estates were vested in *Howard;* that he was in effect the receiver of the rents, and so agent for all parties; but particularly from the circumstance that on paying the Plaintiff, he charged and received on the money paid a commission of two and a half *per cent.*, the commission he was always in the habit of receiving on annuity payments. If this had been a loan or an advance to the Plaintiff, and not a payment on account of the annuity, *H.* and *G.*, instead of the commission could only have taken a discount at the rate of five *per cent. per annum.* But *Howard* being the receiver of *Henry Michael Goold*'s rents, and having confidence in the security, advances this money on account of the annuity, in anticipation of the forthcoming rents, and as agent of the grantor, for the advantage of receiving two and a half *per cent.* commission, and in the expectation of being reimbursed by the rents, when they should become due; and though he cannot sue for the money so advanced, yet his se-

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curity is in his own hands, and he may deduct the amount upon his account of the proceeds of the estate. The Plaintiff, therefore, having received the sum in question clearly in discharge of his annuity, cannot now imprison the Defendant for the amount. From the foregoing argument, it appears that there has been no assignment by the Plaintiff to *Howard* of the debt due to the Plaintiff; for the annuity being regularly paid by *Howard*, as agent of the grantor, there was no reason why the Plaintiff should assign But even if such a constructive assignment could be deemed to have taken place, *H.* and *G.* could not be in the condition of assignees of a bond, nor entitled to issue process in the Plaintiff's name. The obligee who assigns a bond always covenants to permit the assignee to sue in the obligee's name, and such suit is, therefore, with his privity and consent; but the present execution is issued without any such covenant on the part of the Plaintiff, and even, for aught that appears, without his knowledge. In the case of *Butt* v. *Conant*, the payment was made not by the agents of *Butt*, or on his account, but by entire strangers, and for the sole benefit of the Defendant.

In *Godsal* v. *Boldero* (*a*), a creditor who had been paid by the public a debt due from Mr. *Pitt* was not allowed to recover the amount from an insurance office: the Defendant in the present case is no more than an insurer or surety.

DALLAS C. J. This is an application on behalf of a surety, and, therefore, entitled to the favourable consideration of the Court. It appears, that in the course of the transaction which is the subject of the present discussion, payments of a certain kind have been made, and the surety claims the benefit of those payments,

(*a*) *Park on Ins.* 641.

being

being willing to discharge any balance which may be found due after those payments shall have been taken into account; and there can be no doubt he is entitled to the benefit of these payments, if they were made on account of the annuity which has been granted by his principal. What are the facts of the case? *Henry Michael Goold* is the grantor of the annuity; *Howard* and *Gibbs* are the trustees for *Williamson*; and the Defendant, who is a surety for *Henry Michael Goold*, gives a bond and warrant of attorney to *Williamson*, to enter up judgment for any arrears of the annuity which may be due from *Henry Michael Goold*. *Cookson* is appointed receiver on the spot, to act under *Howard* and *Gibbs*, the persons who negotiated the annuity, and who are trustees for the payment of this and other incumbrances charged on the estate of *Henry Michael Goold*. In effect, and with a view to the discharge of his trust, *Howard* was to receive the rents of the estate. This, therefore, is not the case of a stranger but of an agent, standing as it were in the midst of several parties, and accountable to all. This, therefore, disposes of the case of *Butt* v. *Conant*, and of all other cases in which the payment in question was not made by an agent of the party.

The applicant in the present case, who is in custody under an execution for the amount of the annuity which may be in arrear, prays to be discharged on payment of the balance which may be found due. If any thing has already been paid, it is clear the grantee must not be paid twice; but it is equally clear, that *Williamson* has been paid a considerable sum. Such a payment is distinctly sworn to; and *Williamson* makes no affidavit denying the payment, repudiating it, or in any way accounting for it. But it has been urged, that this payment was in truth an advance made by *Howard* and *Gibbs*, out of their own funds, and with a view to

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its being replaced by the rents of the estates. If so, and the question were merely in what form or from whom *H.* and *G.* could recover the money so advanced, it might, perhaps, be contended they were entitled to recover it as against the principal, though not against the surety; but the question is, not whether they can recover the money if it has been so advanced, but whether they can recover it by such a course as they have at present pursued. I deny that they could recover it even against the grantor. I think they can neither legally nor equitably recover it against the surety; and if they can recover it in any quarter, it must be by a course very different from the present. The payments made by them were made on account of the annuity; they were accounted for as such, and a remuneration of two and a half *per cent.* was claimed and received as for such annuity payments. These, therefore, though voluntary payments to the grantee, were received by him on account of the annuity. Can he then, after this, set up a claim as in case of non-payment? Looking to the form and effect of the deed, it appears to me clearly not. He has been paid; and *H.* and *G.* cannot recover back from him what they have paid, because they have received their commission upon it. If they had merely lent a sum of money, instead of paying it on account of the annuity, and had received no commission on the payment, then, indeed, they might have sued the borrowers for the money lent; but it is not pretended the transaction was of this nature: and can they without the consent of the grantee or of the other creditors, put themselves in his place? I know of no principle or case that can warrant such a proceeding. It is said that the debt due from the grantor of the annuity has been assigned by the grantee to *H.* and *G.*, but no such assignment has ever taken place. It is said that the circumstances of the transaction gave

them

them an equitable right to stand in the grantee's place. Admitting this to be so for the purpose of argument, (and I can admit it no further,) as against the grantor, as against his surety they can only claim under a legal right; for the doctrines of equitable right do not apply as between the grantee and the surety. I forbear to enquire how far any equitable right may arise as between the creditors of *H.* and *G.* and the surety: if there be any such right in a court of equity, it must be ascertained; in this court and in this form, they can have no right to affect the surety. On every ground, therefore, no facts being disputed, and there being no doubt about the principle, I think this rule must be made absolute.

PARK J. I am of the same opinion. This rule was obtained last term, calling on the Plaintiff to shew cause why the execution should not be set aside on payment of the balance due, and as he now makes no affidavit, we must assume that he admits the facts which form the ground of the Defendant's application. The Defendant, as surety, engages to pay when default shall have been made in payment by his principal; that is the whole of his undertaking. He is, therefore, only liable where *Henry Michael Goold* has made default: but to the extent of 3213*l.* he has made no default; for the Plaintiff has received the money from *Howard* and *Gibbs*, and they have had their commission on the payment. If Sir *George Goold* had paid this money, *H.* and *G.* could not pretend to use the process of the court against the surety; nor can they now, having, as agents of *Henry Michael Goold*, paid the Plaintiff, call on the surety to repay them what they have advanced. He is only bound to answer for the default of *Henry Michael Goold* towards the Plaintiff; but in consequence of what his agents

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agents have done, *Henry Michael Goold* has (to the extent of what they have paid) made no default.

BURROUGH J. The affidavit of *H. M. Goold* says that 3213*l.* has been paid. This the Plaintiff should have answered; because, if it is true, the surety is entitled to be relieved to that extent. The answer given is, that *Howard* and *Gibbs* advanced this money in anticipation of the sums due to the Plaintiff, and that they held the deeds in their hands all the time; from whence the Court is desired to infer, that they held them as a security for the money so advanced: but the deeds were in their hands because a term in *Henry Michael Goold*'s lands was conveyed to *Howard* for the Plaintiff's security. Then although it is sworn that the money was advanced by *H.* and *G.*, not in payment, but in anticipation of the annuity, no one fact is adduced to substantiate that statement; no receipts, no engagements of any kind: on the contrary, *H.* and *G.* admit their having received a commission of two and a half *per cent.*, which is the commission usually charged by them on regular payments. If this money had been advanced, as is pretended, by way of loan, would there not have been a stipulation for interest, to which the parties would have been fairly entitled; would there not have been some memorandum, and a power to use the Plaintiff's name in suing out execution, the common machinery in such cases? That the Plaintiff has received the money, is clear from the circumstance of his making no affidavit to the contrary. Whatever sum then the Plaintiff has received, the surety is discharged to that extent; for it is immaterial to him whether the money was paid by *Henry Michael Goold* or his agent: the surety is only liable in case of its not being paid at all. When we see a money scrivener getting grantor, grantee, and all estates and securities into his own hands,

we

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we are bound to look with eagle eyes at such a transaction. In the present case, as far as the Plaintiff has received his annuity, there has been no default in payment for which the surety can be held responsible; and, therefore, this rule must be made

Absolute.

BLACKFORD, Assignee of the Sheriff of ———, v. HAWKINS.

Feb. 11.

The Plaintiff cannot sue on the bail-bond after ruling the sheriff to bring in the body.

THE Plaintiff having taken an assignment of the bail-bond, after he had ruled the sheriff to bring in the body,

Taddy Serjt. obtained a rule *nisi* to set aside the proceedings on the bail-bond as irregular, on the ground that the Plaintiff could not rule the sheriff and sue on the bail-bond too; and that having ruled the sheriff first, he must be deemed to have made his election. *Wright* v. *Walker*.(a)

Lens Serjt., who shewed cause against the rule, contended that upon the assignment of the bail-bond, the proceeding against the sheriff was abandoned; and that the Plaintiff could not be said to have made his election till he had actually sued on the bail-bond: then, indeed, and not before, he was precluded from proceeding by attachment.

But the Court, upon referring to the secondary, were clear that the Plaintiff's election was determined upon his ruling the sheriff to bring in the body, and they accordingly made *Taddy*'s rule

Absolute.

(a) 2 B. & P. 564.

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Feb. 11.

Bale v. Hodgetts.

1. The Plaintiff may issue a writ of enquiry in the ordinary form in an action of debt for treble value of tithes.
2. In finding the treble value, the jury in effect find the single value also.
3. If the jury omit to find costs, the Court may, where the Plaintiff is entitled to them, make such an entry on the postea as is usual to authorize the allowance of costs.
4. *Semble*, That under 8 & 9 *W.* 3. *c.* 11. *s.* 3., (which gives the Plaintiff costs in certain cases, in actions for treble value of tithes,) the Plaintiff is only entitled to such costs after plea pleaded, or demurrer joined.

DEBT on the statute of 2 & 3 *Edw.* 6. *c.* 13. First count for the treble value of predial tithes not set out; second, for tithes bargained and sold; third, on an account stated. The Defendant having suffered judgment by default, a writ of enquiry was issued in the common form, and the sheriff returned 26*l.* 4*s.* 9*d.* as the finding of the jury for the whole damages incurred; which sum was divided thus: 17*l.* 4*s.* 9*d.* for the treble value of the tithes mentioned in the first count, and 9*l.* for the single value of the tithes mentioned in the other counts.

D'Oyley Serjt., on a former day, had obtained a rule calling on the Defendant to shew cause why the return of this inquisition should not be amended by the insertion of nominal damages for 1*s.*, and why costs *de incremento* should not be added thereon.

Lawes Serjt. shewed cause against the rule. Though perhaps a writ of enquiry might issue in the present case, notwithstanding it is an action of debt (*Arden* v. *Connell*) (*a*); yet the inquisition ought not to have been in the common form, but, with a view to costs (which, on the first count of the declaration, could only be given if the single value of the tithes was less than 20 nobles,) ought expressly to have ascertained the single value of those tithes. On this ground, therefore, the particular amendment prayed cannot be allowed, since the Court cannot supply the finding of a jury: so likewise the finding of nominal damages, being a

(*a*) 5 *B.* & *A.* 885., *per Holroyd* J.

proceeding

proceeding before the sheriff on oath, the omission of them is not a mere misprision of the clerk, which the Court can rectify. The Court has not jurisdiction to insert any thing that ought to be the finding of a jury. *Ward* v. *Snell* (*a*), which was an action for a penalty, is distinguishable from the present case, which is an action for treble damages. For the detention of a penalty, the Plaintiff is entitled to damages at common law, (*Cro. Car.* 559.) and those damages include costs; but where a statute, since the statute of *Glocester*, in a new case, gives damages, the Plaintiff shall not recover costs. *Pilfold's* case. (*b*) If, however, the Court should think the Plaintiff entitled to his costs, at all events, he cannot recover them on the first count of the declaration, for the statute 8 & 9 *W.* 3. *c.* 11. *s.* 3. only gives costs in actions for tithes, after plea pleaded, or demurrer joined, where the single value found by the jury does not exceed the sum of twenty nobles.

D'Oyley Serjt., in support of his rule. An enquiry in the common way was necessary and proper in this case. Whether or no an enquiry shall issue does not depend on the form, but on the subject matter of the action; and it ought always to issue, when the precise amount of what is due cannot be collected from the declaration: the only object of issuing such a writ is to inform the conscience of the Court; which, with the Plaintiff's assent, may assess damages without an enquiry. *Holdipp* v. *Otway* (*c*) *Blackmore* v. *Flemyng.* (*d*) *Year book*, 11 *H.* 7. 5. *b.* Then, with respect to costs, all the authorities concur in stating that it is the business of the Court to assess them, and not of the jury. *Bac. Abr. Costs*, A. K. 2 *Saund.* 257. The single value of the tithes is sufficiently found, because the treble value could

(*a*) 1 *H. B.* 10.
(*b*) 10 *Rep.* 116.
(*c*) 2 *Saund.* 106.
(*d*) 7 *T. R.* 446.

never

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never have been ascertained unless the single had been first determined. The Plaintiff is entitled to his costs on the first count of the declaration, because in a remedial statute like the 8 & 9 *W.* 3., the Court will look to the general intention of the framers, and will not be tied down by the strict words of the statute. In *Ward* v. *Snell*, Lord *Loughborough* says, "the statute of *Glocester* is a remedial act, and ought to receive a favorable interpretation."

If the legislature intended the Defendant to pay costs where he had a defence in fact or in law, *à fortiori* they would make him pay where he withheld his tithes without any pretence at all. The Plaintiff is bound to pay on discontinuing; and it could scarcely have been designed that the Defendant should stand in a better condition than the Plaintiff. A construction so narrow as that contended for, would be prejudicial to Defendants themselves; for there are no express words which give them costs in case of succeeding on demurrer joined.

DALLAS C. J. It was clearly at the option of the Plaintiff to issue a writ of enquiry; and there can be no doubt that the jury, on finding the treble, have also found the single, value of the tithes. As little doubt can there be, supposing the Plaintiff entitled to costs; that if the jury omit the formal finding, which entitles the Plaintiff to demand them, the Court may order the requisite entry to be made on the *postea*. The case, therefore, is reduced to the consideration of what ought to be the construction of the statute 8 & 9 *W*. 3. *c*. 11. Now, what has the statute said? for if its language be clear, it is immaterial what the reason of the thing may be except with a view to legislative correction. The statute says, "the Plaintiff obtaining judgment or any award of execution after plea pleaded or demurrer joined, shall likewise recover his costs of suit:" and this act having

passed

passed expressly to enable the party to recover costs in cases where he would not otherwise have been entitled to them, does it enable him to claim them, except after plea pleaded, or demurrer joined? It has been observed, and perhaps, justly, that if it be thought proper for the Plaintiff to recover costs where the Defendant has in fact, or in law, grounds for resistance, there is the stronger reason for making the Defendant pay, when he admits himself to be clearly in the wrong; and this argument might have weight, if there were any ambiguity in the words of the statute; but if the words of the statute are express and clear, such reasoning must not prevail: however, it might be urged on the other hand, that the Defendant who resists without sufficient reason, occasions considerable expence to the Plaintiff, while the Defendant who suffers judgment by default, spares him a great deal of vexation and delay. But whether under the statute the Plaintiff is entitled to his costs on the first count of the declaration, we do not now decide: it will answer his purpose sufficiently, if we permit him to make the amendment prayed, and to tax costs *de incremento* on the two last counts of the declaration.

PARK J. I concur with my Lord Chief Justice on the three first points. The main question is, whether the Plaintiff is entitled on his first count to costs, under the statute of *W.* 3.; and though I do not decide the point, I think he is not entitled under the circumstances of this case. As the old law stood, the Plaintiff could not in any case recover his costs, in an action for the treble value of tithes: the legislature then conferred the right after plea pleaded, or demurrer joined, where the treble value does not amount to twenty nobles. Can I suppose the legislature did not understand the difference between a judgment by default, and a judgment after verdict, or that this difference escaped their notice? If

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they meant that the Defendant should pay costs in all cases where the Plaintiff succeeds, *quod voluerunt, non dixerunt.*

BURROUGH J. I should have thought the legislature might have supposed that costs followed as a matter of course upon every judgment by default. Upon the other points in this case, I have no doubt; the rule therefore must be absolute for the Plaintiff to make the amendment proposed, and to tax costs *de incremento*, upon the two last counts of the declaration.

Feb. 11.

NUN *v.* TAYLOR.

The Defendant cannot change the venue after an order for time to plead, on the terms of taking short notice of trial for adjourned *London* sittings after term.

THE Defendant had obtained a Judge's order for time to plead, and was under terms to take short notice of trial for the *London* adjourned sittings after this term.

Pell Serjt. had obtained a rule *nisi*, to change the venue from *London* to the city and county of *Exeter*, relying on the circumstance that the Defendant was to try at the adjourned sittings, and not at a sittings in term, in which case he admitted the rule could not be made absolute, as a trial would be lost; and he cited *Petyt* v. *Berkley* (*a*), to shew that where a trial would not be lost, the venue might be changed under circumstances such as the present.

But the Secondary reported that the practice was otherwise, and the Court discharged the rule.

Peake Serjt. shewed cause.

(*a*) *Cowp.* 510.

CHRISTIE v. WALKER and Another.

Feb. 11.

Where the Plaintiff signed judgment as for want of a plea, because the rule to plead several matters was erroneously entitled *C.* v. *W.*, instead of *C.* v. *W.* and Another, the Court set the judgment aside without costs, affidavit being made that the pleas were true, and that Defendant had a good defence.

THE rule to plead several matters in this cause being erroneously entitled *Christie* v. *Walker*, instead of *Christie* v. *Walker* and Another, the Plaintiff signed judgment as for want of a plea.

Hullock Serjt., upon an affidavit that the pleas were not sham pleas, and that the Defendant had a good defence to the action, obtained a rule *nisi* to set the judgment aside.

Lawes Serjt. shewed cause against the rule, and contended that the judgment being strictly regular, the Defendant ought not to be permitted to set it aside, at all events not without paying costs.

But the Court set it aside without costs, saying, that such practice ought not to be encouraged.

Rule absolute.

BODINGTON v. HARRIS.

Feb. 12.

Where an action for a nuisance was defended by the Defendant's landlord, and the Defendant being told he need not attend the trial, the attorney employed by the landlord entered into a consent rule to abate the nuisance without the consent, and against the directions of the Defendant; the Court, upon strong affidavits to shew that the grievance complained of was no nuisance, set aside an attachment which had issued on the consent rule, and granted a new trial.

THIS was an action for a nuisance occasioned by the working a forge hammer in the outskirts of *Birmingham*, and in an unfinished and unfrequented street.

The

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The action was defended by the landlord of the Defendant, who had let the premises, with the forge, which had been worked there for some years. The attorney employed by the landlord, told the Defendant he need not attend the trial; and when the trial came on, at the last *Warwick* assizes, without the consent, and against the express directions of the Defendant, entered into a consent rule to abate the nuisance. The landlord being also dissatisfied, dismissed the attorney, but refused to proceed further in the business, and told the Defendant he must thenceforward employ an attorney in his own behalf. An attachment having issued on the consent rule entered into at the trial,

Vaughan Serjt., upon affidavit stating the foregoing circumstances, and alleging that the working of the forge was no nuisance in a place such as that described, obtained a rule, calling on the Plaintiff to shew cause why this attachment should not be set aside, and a new trial had.

Hullock Serjt. shewed cause against the rule.

But the *Court* thought there ought to be a new trial under all the circumstances, which they said were so special that their decision could form no precedent, except a case should arise precisely similar in all its points.

Rule absolute.

HOLDING *v.* IMPEY and Others.

Feb. 12.

A commission of bankrupt was sued out against the Plaintiff in *April*, and superseded the 2d of *August*. A second commission was sued out on the 7th of *August*, on the same act of bankruptcy, under which Plaintiff obtained his certificate. Plaintiff sued the Defendants, commissioners under the first commission, for an alleged wrongful imprisonment; they entered up judgment of nonsuit against him in *July*, and afterwards charged him in execution for costs: Held, that the Defendants might have proved their debt under the second commission, and that Plaintiff was entitled to be discharged from it under his certificate.

ON the 21st *April*, 1821, the Plaintiff having committed an act of bankruptcy by lying two months in prison, a commission of bankruptcy was sued out against him, which was superseded on the 2d of *August* ensuing. On the 7th of *August* another commission was sued out on the same act of bankruptcy, under which the Plaintiff obtained his certificate.

The Plaintiff having been nonsuited in an action against the Defendants, who were commissioners of bankrupt, for an alleged wrongful imprisonment under the first commission; they entered up judgment against him for costs in *July*, 1821, and in *January*, 1822, charged him in execution upon this judgment.

Pell Serjt. obtained a rule calling on the Defendants to shew cause why the Plaintiff should not be discharged out of custody, as having obtained his certificate under the commission.

Vaughan Serjt. shewed cause against the rule. The Plaintiff can only be discharged as to debts provable under the commission. The Defendants could not have proved this debt under the commission of the 7th of *August*. The 46 *G.* 3. *c.* 135. enables persons with whom the bankrupt shall have *contracted* any debt before the suing out of the commission, (which, if contracted before any act of bankruptcy, would have been provable under such commission,) to prove such debts under the commission,

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mission, provided they have no notice of any prior act of bankruptcy.* Now, as this debt accrued involuntarily upon a judgment against the Plaintiff, he cannot be said to have contracted it: it never was the subject of a contract; and at all events the Defendants being the commissioners under the first commission, had notice of an act of bankruptcy prior to the accruing of their debt.

But the Court thought the debt clearly provable under the commission of the 7th of *August*, and made the rule

Absolute.

Feb. 12.

CARROLL *v.* Sir GEORGE GOOLD.

An annuity being in arrear, and the rents of an estate on which it was secured being unpaid, the receiver of the rents, who had negociated the annuity between the grantor and grantee, having advanced a sum to the grantee in anticipation of the coming rents, and having received from the grantee on this advance the commission which he usually received on annuity payments, the Court set aside an execution, which (the rents proving insufficient,) the grantee afterwards issued for this sum against the grantor.

BY an indenture of five parts, bearing date *July* 16, 1811, between the Defendant, of the first part; Plaintiff, of the second; certain other persons named in the schedule, of the third; *Edward Howard*, of the fourth; and *James Gibbs*, of the fifth;

The Defendant in consideration of 2450*l.*, granted to the Plaintiff an annuity of 350*l.*, secured upon Defendant's estates in *Ireland*, which were thereby demised to *Howard* for a term of years, and *Gibbs* was appointed receiver of the rents in case the annuity should be a certain time in arrear. As a further security, judgment was also entered up against the Defendant upon a warrant of attorney. In 1818, the annuity being greatly

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in arrear, *Howard*, by an agent in *Dublin*, entered into the receipt of the rents, and applied them from time to time in discharge of the annuity. The Plaintiff, in 1820, becoming very urgent for payment of arrears then due, *Howard* and *Gibbs* agreed to advance him 525*l.* in anticipation of the then expected payments of the arrears; and they transmitted him an account, in which, after deducting two and a half *per cent.* commission for payment by them as agents of the Plaintiff, and some other charges, there appeared to be due to the Plaintiff 305*l.* 17*s.*, and the following letter accompanied the account:

"My dear Sir,

"Above I have the pleasure to send your account, for the balance of which, though not yet received by me, I will honour your draft at sixty days sight, as before that time I shall be in full possession I little doubt; at any rate, draw your draft at sixty days sight, and it shall meet with due honour.

"*James Gibbs.*"

The commission of two and a half *per cent. Howard* and *Gibbs* charged to annuitants upon all payments made by them. The Plaintiff's bill for 305*l.* 17*s.* was accepted and paid by *Howard* and *Gibbs*, who afterwards delivered an account to the Defendant, in which they made him debtor on account of the Plaintiff's annuity to the extent of 1925*l.*, which included the money so advanced by them. *Howard* and *Gibbs*, in an affidavit, said they did not consider themselves Defendant's agents, and that another attorney acted always on his behalf.

In *November* last the Defendant was taken in execution at the suit and under the direction of the Plaintiff, without the knowledge of *Howard* and *Gibbs*, for 1848*l.* 11*s.* 8*d.*, of which sum the Defendant asserted 680*l.* 3*s.* 8*d.* had been paid by *Howard* and *Gibbs* in

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advance as aforesaid, leaving a balance of 1168*l.* 8*s.* due. The Defendant received notice from the assignees of *Howard* and *Gibbs*, who had become bankrupts, not to pay this 680*l.* 3*s.* 8*d.* to the Plaintiff, "because the bankrupts had paid it in advance on the credit or security of the said annuity, and the assignees were entitled to recover it out of the arrears," and they ordered him not to pay any part of the 680*l.* 3*s.* 8*d.* to any person but the assignees.

The Defendant or his estate had never paid any part of the 1848*l.* 11*s.* 8*d.*

Lens Serjt. had obtained a rule calling on the Plaintiff to shew cause why the writ of execution should not be set aside upon payment of the balance due to Plaintiff, with the costs, fees, &c. upon such balance only.

Vaughan and *Taddy* Serjts. opposed the rule on behalf of the Plaintiff; and *Hullock* Serjt. on behalf of the assignees of *Howard* and *Gibbs*. Nearly the same arguments were used on both sides, as in the former case; but it was urged that this was a stronger case in favour of the Plaintiff, inasmuch as the Defendant being principal, the considerations on which the Court acted in favour of sureties did not arise, and it appeared clearly from *Gibbs*'s letter, that the money paid by him was an advance or loan to the Plaintiff, and not a payment on account of the annuity. For the Plaintiff it was also urged, that money paid on the credit of a fund which fails, is paid without consideration; that the assignees of *Howard* and *Gibbs* might sue the Plaintiff for what he had received in advance, and that therefore he was without remedy if the present execution should be set aside.

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DALLAS C. J. If I thought the opinion I so lately delivered, was wrong, I should be ready to say so; but I adhere to that opinion; and with respect to the substantial arguments applicable to it, I do not think this case differs from the preceding. It is true this is not the case of a surety, and between the case of a surety and the case of a principal there may be many essential distinctions. A surety is favoured in equity and in law, though, perhaps, when he enters into a contract with his eyes open, there is no very good ground for the favour shewn him; the distinction however has been repeatedly recognised. But that distinction makes no difference here, nor does the letter from *James Gibbs;* that letter indeed rather makes against the Plaintiff than otherwise; for the commission of two and a half *per cent.* which it states to have been charged, shews that the advance must have been made on account of the annuity: it was clearly a voluntary advance made by *Howard* and *Gibbs* on account of the annuity, for the benefit of this commission of two and a half *per cent.* But if they have so made the advance to *Carrol* for the sake of this benefit, is *Carrol* entitled to put in force his security for the money already paid, or can *Howard* and *Gibbs* put it in force without his consent? I see nothing in the present case to distinguish it in effect from the preceding, and think the rule must therefore be made absolute.

PARK J. This is a stronger case for our interference on behalf of the Defendant than the other, because here the execution was issued on the authority of the Plaintiff, for a sum which he admits he has received. Supposing *Howard* and *Gibbs* had paid *Carrol* the whole of his annuity, could it be pretended that *Carrol* might have issued execution for the whole that he had so received? *Howard* and *Gibbs* are in the situation of persons

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persons who have made a voluntary payment; that payment they cannot rescind; but they are receivers of the Defendant's rents, and out of those rents they must seek to reimburse themselves. It is clear that we have jurisdiction over our own process, which in this instance has been improperly applied.

BURROUGH J. The money was paid and received as on account of the annuity; the receipts that were given have not been produced; if they had been produced, I am satisfied it would have appeared on the face of those receipts, that the payments were made on account of the annuity, which indeed sufficiently appears without the production of them. The Plaintiff has the assurance then, to issue process for money which he has received, and which he has never been called on to refund. This is a great abuse of the process of the court: we have a right to interfere, and the rule must be made

Absolute.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term (a),

In the Fourth Year of the Reign of GEORGE IV.

MEMORANDUM.

IN the course of the last vacation, Sir *George Wood* resigned the office of one of the Barons of the Court of Exchequer, and was succeeded by *John Hullock*, Esq., serjeant at law.

(a) *Richardson* J. was absent during this term, being afflicted with ill health.

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April 17.

STEAD *v.* LIDDARD.

A., by a letter in which the consideration of the transaction sufficiently appeared, entered into an agreement with *B.*, and *B.* became party to the engagement by writing a few lines at the bottom of a copy of *A.*'s letter. *C.* became guarantee for *B.* to *A.* by an indorsement on the back of this copy of *A.*'s letter, in which indorsement reference was made to the terms of the agreement on the other side: Held, in an action on the guarantee, that only one stamp was required on this paper, and that the reference in the indorsement to the terms of the agreement was a sufficient memorandum of the consideration for the guarantee within the statute of frauds.

THIS was an action on a guarantee, which, at the trial before *Dallas* C. J., *London* sittings after last *Hilary* term, was made out as follows:

The Defendant's son, *Lewis Agassiz Liddard*, was residing at *Drontheim*, when the Plaintiff arrived there with part of a cargo of stock fish, on board a vessel called the *Fancy*. Defendant's son purchased on account of the Plaintiff, a quantity of stock fish and oil, which were paid for by the Plaintiff, in bills drawn by the Plaintiff, and accepted by the Defendant's son. Defendant's son was engaged by Plaintiff to dispose of the fish and oil, and for so doing, was to be interested in one-third as a compensation for his trouble. This agreement was completed by the Plaintiff's writing to the Defendant's son the following letter:

"15, *Bush Lane*,
"29th *Dec.* 1819.

"Dear Sir,

"Having paid chief part, and come under acceptance for the remainder of the cost of the cargo of fish per *Fancy*, and 200 barrels of oil to *Amsterdam* and *Altona*, with the freight and premium insurance per *Fancy* also paid by me, I have drawn on you of this date:

	£.
At two months date for - -	1600.
— three months date for - -	1000.
	£2600.

which

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which you will please accept, and which I pledge myself for; the same to be appropriated for the repayment to me of the above; and you, on the other hand, are to remit your father or me the proceeds of the above goods, and the balance due by *Jenssen* on the bills given him at *Trondlijem*, to meet the payment of your acceptances as above, to be put into the hands of my bankers, Sir *P. Pole* and Co., for the purposes mentioned. The profit or loss on the cargo of fish, per *Fancy*, and the 200 barrels being on account of yourself one-third, and me two-thirds.

"I am, dear sir,
"Yours obediently,
"*D. Stead.*"

A copy of the above letter was made, and kept by Plaintiff; at the foot of which Defendant's son wrote as under:

"Above is copy of a letter handed to me this day by Mr. *Stead*, and agree to its contents, errors excepted, having accepted the bills in question to be handed to Sir *P. Pole* and Co.

"*Lewis Agassiz Liddard*, 29th *Dec.* 1819."

On the back of the copy of the above letter in possession of the Plaintiff, was written the following guarantee of the Defendant:

"26th *February*, 1820.

"Mr. *D. Stead*,
"Sir,

"I hereby agree to pay, or to hand over to you or to Sir *P. Pole* and Co. immediately on receipt thereof, all such sums of money and bills of exchange as may come to my hands from, or be remitted to me by my son *Lewis Agassiz Liddard*, agreeably to the foregoing copy of a letter, and agreement or undertaking; such bills or monies to be appropriated to the payment of the acceptances mentioned in the said copy letter. And in

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in consideration of your having paid for the whole cost of fish and oil as therein stated, and having given to said *L. A. Liddard* an interest in such shipment to the extent of one-third, I hereby engage to be responsible and accountable to you for the proceeds that may be procured by him for the same, and for the due application and remittance by said *L. A. Liddard*, in conformity with said copy letter, of all monies and bills which he may receive, or that may be paid to his order on account of the said fish and oil, and the balance of bills given to *Jenssen*.

"I am, Sir,

"Your most obedient servant,

"*William Liddard.*"

Upon this paper, when it was produced, there was one agreement stamp.

Lens Serjt. moved for a rule to shew cause why a verdict which had been found for the Plaintiff should not be set aside and a new trial granted, on the ground that there was no stamp for the Defendant's guarantee. That guarantee, though written on the same paper as the copy of the agreement between the Plaintiff and the Defendant's son, was in truth a separate and distinct agreement between different parties, and ought therefore to have a separate stamp. The stamp act (*a*) had provided, that when an agreement was made up of various letters passing between the parties, it should be sufficient to stamp one of the series. But it was impossible, here, to connect the guarantee from the Defendant to the Plaintiff with the agreement between the Plaintiff and the Defendant's son, for the two transactions were entirely distinct contracts. *Lens* also objected, that the only consideration stated on the face of the guarantee, was a

(*a*) 55 *G.* 3. *c.* 184.

past

past or executed consideration, which, without the addition of a previous request, was no consideration at all, and then the guarantee, for want of a sufficient consideration appearing on the face of it, was void. *Wain* v. *Warlters* (a), *Saunders* v. *Wakefield* (b), *Jenkins* v. *Reynolds*. (c)

But the *Court* thought that the whole formed one transaction; that one stamp therefore was sufficient; and that reference being made in the guarantee to the copy of the Plaintiff's letter on the same paper, and forming part of the same transaction, there was a sufficient memorandum of the consideration within the statute of frauds. They, therefore, refused the rule, and *Lens*

Took nothing.

(a) 5 *East*, 10. (b) 4 *B. & A.* 595. (c) 3 *B. & B.* 14.

CLIFFORD *v.* BURTON.

April 19.

Where the wife served in her husband's shop, and carried on the business of it in his absence: Held, that admissions made by her on application to pay for goods before delivered at the shop, were receivable in evidence against her husband.

IN this cause, which was tried before the Lord Chief Baron at the last *Hertfordshire* assizes; the Plaintiff, in order to substantiate a demand for goods sold and delivered at the Defendant's shop, proved an admission made by the Defendant's wife, who served in his shop, and carried on the business of it in his absence. The witness applied to her for 28*l.* 16*s.*; and the admission consisted in her saying, she would pay it if the Plaintiff would allow 10*l.*, which she claimed, and give a receipt in full.

It was objected, that the circumstance of the wife's serving in the shop was not evidence of such a general agency

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CLIFFORD
v.
BURTON.

agency as would authorise her thus to settle an account, or the court to receive evidence of such a transaction, which was altogether separate and distinct from her service in the shop.

The evidence having been received, and a verdict found for the Plaintiff,

Taddy Serjt. now moved for a new trial on the above objection to the wife's evidence: he contended, that admissions by her in the character of agent, must be confined to the transactions in which she was immediately employed; that she had no authority to settle an account except as part of the *res gestæ* upon the delivery of goods in the shop; and that evidence of admissions made upon a separate application for payment ought to *have been excluded. In *Emmerson* v. *Blonden* (a), and in 1 *Str.* 527. *Anon.*, the wife was acting within the scope of her authority, and what she said constituted a part of the authorized transactions. But a principal is not bound by the representations of the agent made at a different time, *Peto* v. *Hague.* (b)

But the *Court* thought there was evidence from which it might be presumed the wife was acting within the scope of her authority when she offered to settle a demand for goods delivered at a shop in which she served, and the business of which she was in the habit of conducting; and they

Refused the rule.

(a) 1 *Esp. N. P. C.* 142. (b) 5 *Esp. N. P. C.* 134.

1823.

LANCHESTER *v.* TRICKER.

April 19.

Twenty parishioners joined at a vestry in signing an order authorising two churchwardens to put a new roof on the parish tower; the two churchwardens concurred in giving orders for that purpose, and one of them, the Plaintiff, paid the artificers: a rate for reimbursing them having been quashed, the Plaintiff sued the other churchwarden for a moiety of the money so paid: Held, on motion for a new trial, that the Defendant could not insist on the joinder with him of the twenty parishioners who had signed the vestry order.

AT the trial of this cause before *Garrow* B., at the last *Suffolk* assizes, it appeared that the Plaintiff and Defendant were, in the year 1811, churchwardens of *Bury*. That, on the 8th of *July* in that year, at a vestry meeting a resolution was signed by the Plaintiff and Defendant and twenty other parishioners, that the churchwardens should be authorised to put a new roof on the church tower belonging to the parish. Orders were accordingly given by the Plaintiff and Defendant to various artificers for this purpose, and the work was duly performed, and paid for by the Plaintiff.

In 1812, at a vestry meeting, a rate was made to reimburse the churchwardens for the sums they had expended in the repairs of the church tower. Such rate being quashed as illegal (*a*), the Plaintiff sued the Defendant for the moiety of the sums paid by the Plaintiff; when the Defendant pleaded in abatement, that the promises in the declaration mentioned were made by him jointly with others, naming the twenty parishioners who had signed the order for the repairs of the tower.

A verdict having been found for the Plaintiff,

Frere Serjt. now moved to set aside this verdict, and enter a verdict for the Defendant, or to have a new trial, on the ground that those parishioners who had signed the vestry resolution jointly with the Defendant, must be bound by their own signature, and equally liable with him,

(*a*) *Rex* v. *Chapelwardens of Bradford*, 12 *East*, 556.

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LANCHESTER v. TRICKER.

him, though a retrospective rate could not be levied on the other parishioners.

But the *Court* thought, that in signing the resolution, they acted only as vestrymen without any intention of becoming separately liable; that there could be no more reason for joining them in the action than all the rest of the parishioners: But that the Defendant having concurred with the Plaintiff in giving the orders to the artificers, was liable to the Plaintiff for a moiety of what he had paid.

Rule refused.

April 19.

SNAPE and Wife *v.* DOBBS.

Where, under an act of parliament, a canal reservoir was made over lands in which *A.* and *B.* had separate interests, and the act provided "that it should be lawful for the owner or owners of the lands on which any such reservoir should be made to let all the water out of such reservoir once in seven years, for the purpose of taking the fish therein:" Held, that *A.* and *B.* were not tenants in common of this septennial fishery.

THIS was an action of account: the Plaintiffs in their declaration alleging that they and the Defendant had held together and undivided, as tenants in common, nine acres of land covered with water, and a fishery, of which the Defendant had the management to take the fish, and as bailiff of the Plaintiffs, to render a reasonable account of what he received more than his just share thereof; and that he never accounted.

And the question was, whether the Defendant was tenant in common with the Plaintiffs of this fishery: — at the trial before *Bosanquet* Serjt., who sat for *Richardson* J. at the last *Worcester* assizes, the facts were as follow.

The Plaintiffs and Defendant were separately possessed of two pieces of land, about four acres and a-half each, which the proprietors of the *Birmingham* canal navigation had converted into a reservoir under the provisions of 31 *G.* 3. *c.* 59. By the 11th section of that act it is provided, "That it shall be lawful for the owner or owners of the lands on which any such reservoir shall be made, to let all the water out of such reservoir once in seven years, for the purpose of taking the fish therein; the water to be so taken out in the month of *November*, and at no other time."

Under this section it was contended, that the Plaintiffs and Defendant, though severally interested in the lands over which the reservoir had been made, were tenants in common of the fishery established by the septennial exhaustion of the reservoir; but, *Bosanquet* Serjt. thought their interest in the fishery was several; that each party was entitled to have the fish left on his own land when the reservoir was exhausted; and he accordingly directed a nonsuit.

Peake Serjt. now moved to set aside this nonsuit and enter a verdict for the Plaintiff, or to have a new trial, on the ground, that from the nature of the case, the Plaintiff and Defendant must be tenants in common of the fishery, because, as the fish would pursue the ebbing water, and finally be stranded on the land of the party who was lowest down the stream, no fish would remain stationary over the land of either, and there would be no means, in case of exhausting the reservoir, of giving each his fair share of the profits, without supposing a tenancy in common in all the fish; the fish thus passing from the water of one into the water of the other, the parties must have the same sort of right as they would have, if the root of a tree had extended from the land of one into

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v.
DOBBS.

the land of the other; and in that case, they would be tenants in common of the tree. *Waterman* v. *Soper*. (a)

But the *Court* thought that each of the parties had a several right of fishery in the water over his own land, and that when the reservoir was exhausted, each must take his chance of the fish that should be left aground on his own soil.

Rule refused.

(a) 1 *Ld. Raym.* 737.

Note. The act of parliament vests the fishery in the owners of the land on which the reservoir shall be made. The land on which the reservoir in question was made, was, in fact, purchased absolutely by the canal proprietors of the Plaintiffs and the Defendant, with sufficient for a considerable margin round the banks; so that it should seem the canal proprietors are entitled to the fishery, and not the parties in this cause.

April 21.

SHERWIN v. SMITH.

In an action to recover the amount of an apothecary's bill, the Plaintiff who, under 55 *G.* 3. *c.* 194., proves a certificate from the Society of Apothecaries, need not also prove an apprenticeship served.

BY the 55 *G.* 3. *c.* 194. *s.* 14. it is enacted, that after *August* 1st, 1815, it shall not be lawful for any person, except persons then in practice, to practise as an apothecary, unless he shall have been examined by the Court of Examiners by the said act constituted, or the major part of them, and have received a certificate of his being duly qualified to practise as such, from the Court of Examiners. Provided, that no person shall be admitted to any such examination for a certificate to practise, unless he shall have served an apprenticeship of not less than five years to an apothecary, and unless he shall produce testimonials to the satisfaction of the Court of Examiners, of a sufficient medical education

and

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v.
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and of a good moral conduct: and that no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial, that he was in practice as an apothecary prior to, or on the 1st of *August*, 1815, or that he had obtained a certificate to practise as an apothecary from the Court of Examiners as aforesaid.

The Plaintiff sought by this action to recover the amount of an apothecary's bill; and at the trial of the cause before *Bayley* J., *York Lent* assizes, 1823, proved a certificate duly issued by the Court of examiners constituted by the 55 *G.* 3. *c.* 194., but did not prove that he had served an apprenticeship, which it was objected, he ought to have done under the provision of the 14th section of that act; the objection, however, was overruled, and a verdict was found for the Plaintiff.

Pell Serjt., who moved for a new trial, now renewed this objection in support of his motion.

But the *Court*, considering the language of the statute, "that no person shall be admitted to any such examination unless he shall have served an apprenticeship," thought the certificate conclusive of the apprenticeship, and

Refused the rule.

1823.

April 24.

CHRISTIE v. WALKER and Four Others.

Where the affidavit to hold to bail named five Defendants, separate bailable process was issued against one, and a bail-piece taken, in which he alone was named; afterwards, serviceable process was issued against the other four, who were not named in the bailable process; the declaration was against all five; the Court permitted the Plaintiff to amend the bail recognizance by inserting the names of the four Defendants who had been at first omitted.

THE affidavit to hold to bail named all the five Defendants; a bailable *capias* was issued against *Walker* on the 4th of *May*, 1822, in which writ the four other Defendants were not named, (either in the body of the writ or the *ac etiam* clause;) and on the 11th of *May*, 1822, a serviceable *capias* was issued against the four other Defendants, in which *Walker* was not named. The bail-piece named *Walker* only, of the five Defendants; the declaration was against all five.

The Court having in *Michaelmas* term last refused to enter an *exoneretur* on the bail-piece, which was moved for, on the ground of a variance between the process and the declaration; (see *ante*, 68.)

Bosanquet Serjt., in this term, obtained a rule *nisi* to amend the bail recognizance, by inserting on it the names of the other four Defendants, without which amendment, the Plaintiff in an action on the recognizance might be nonsuited or unable to sustain his action. *Mann* v. *Calow* (a), *Halliday* v. *Fitzpatrick* (b), were cited as authorities for such an amendment.

Pell Serjt. shewed cause against the rule. The Court cannot allow the amendment required, because they cannot put on record a statement contrary to fact. At the time when the bail-piece was taken with respect to *Walker*, the action had not commenced against the four other Defendants; the *capias* against them not having been sued out till some days after *Walker* was holden to bail.

(a) 1 *Taunt*. 221.

(b) 4 *Taunt*. 875.

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v.
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bail. *Walker* was arrested in a suit against *Walker* alone, and not against all five. The affidavit to hold *Walker* to bail was no commencement of the action against the other four.

But the *Court*, consistently with their former decisions in this cause, held that the amendment required, would not be contrary but according to the fact; that the affidavit to hold to bail sufficiently disclosed the cause of action, and the Plaintiff's intention to sue all five Defendants; that the only object of process was to bring them into court; and that he ought not to suffer for suing out two writs when the practice of the Court required him to do so.

Rule absolute.

WHITFIELD *v.* JAMES.

April 25.

Where an attorney is entitled to the costs occasioned by the taxation of his bill, he ought to apply for them at the time; and cannot recover them by motion after making a subsequent settlement.

ON the 28th of *February* last, the Defendant caused the bill of his attorney to be taxed, when, the bill amounting to 68*l.* 11*s.* 6*d.*, the prothonotary took off 5*l.* 1*s.* 8*d.*; which being less than one-sixth of the whole amount, the attorney became entitled, according to the practice of the court, to his costs occasioned by the taxation. Those costs amounted to 10*s.* only; they were not demanded at the time, and the attorney settled a subsequent account with the Defendant, without applying for them. He now, however, by *Peake* Serjt., moved for a rule *nisi* to have them allowed;

But the *Court* held, that if he meant to insist on having them, he ought to have preferred his claim at

 the

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WHITFIELD v. JAMES.

the time, and that having made a subsequent settlement, he could not now be permitted to open the account for 10*s*.

Rule refused.

April 26.

TOOTH *v.* BODDINGTON.

Amendment is so little favoured in a writ of right that, after an amendment had been made under a judge's order, the Court discharged the order.

BOSANQUET Serjt., on the second day of this term, obtained a rule *nisi* for discharging a Judge's order made on the 21st of *February* last, after plea pleaded and writ of view served, for the Plaintiff to be at liberty to amend the declaration in this cause, which was an action on a writ of right.

The amendment was, in a material point, to enable the Demandant, instead of demanding freehold lands, to allege that he was seised at the will of the lord. *Charlwood* v. *Morgan* (*a*) was cited, to shew that a material amendment is not permissible in a writ of right.

Lawes Serjt. shewed cause against the rule, but it appearing that the order had been granted inadvertently, the Court thought the amendment such as ought not to be permitted in a writ of right, and made the rule

Absolute.

(*a*) 1 *N. R.* 64.

1823.

GLASIER v. EVE and Others.

April 26.

Held, upon motion for a new trial, that in an action by *A.* against *B.* for taking goods which *A.* claimed by assignment from the sheriff under an execution at the suit of *A.* against *C.*'s effects, *A.* must prove the judgment against *C.* as well as the writ of execution, unless it appears upon the record or judge's report that *B.* is the assignee of *C.*

THE Defendants as assignees of one *Bowmar*, a bankrupt, had taken possession of property which the Plaintiff claimed under a bill of sale by the sheriff of *Lincoln* to him, upon two executions, which he had issued previously to the bankruptcy, against the effects of the bankrupt. These effects the Plaintiff sought to recover in trover, but he did not sue the Defendants as assignees. At the trial before *Graham* B., last *Lincoln Summer* assizes, the Plaintiff proved warrants of attorney, on which judgments had been entered, the writs of execution, and the assignment from the sheriff; but omitting to prove the judgments, he was nonsuited.

Lens Serjt. having obtained a rule *nisi* to set aside this nonsuit, and have a new trial,

Vaughan Serjt. now shewed cause against the rule, and contended, that as the Plaintiff asserted a right of property, he must shew a good title *in omnibus*, and that the judgment was a constituent part of his title. *Vaughan* cited *Martin* v. *Podger* (a), in which Lord *Mansfield* held, that even sheriff's officers, when defendants in an action for taking goods, were bound to produce the judgment on which the execution issued.

Lens, in support of his rule, argued, that it was sufficient for the Plaintiff to make out a *primâ facie* title; that in *Martin* v. *Podger*, Lord *Mansfield* held, that the writ alone would have been a sufficient justification, as

(a) 5 *Burr.* 2631.

against

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against the party whose goods were seised under it, because he must be supposed to be cognisant of the judgment; and that in the present case, the Defendants being assignees of the party against whom the execution issued, stood exactly in the same situation as he did and to this the Court appeared to assent; but

Vaughan here interposed, and asserted, that it did not appear on the record or on the Judge's notes, that the Defendants were assignees; when

DALLAS C. J. said, if there was nothing on the report from which it could be collected that the Defendants were assignees, the judgment of the Court must be decisive against the Plaintiff.

There being some little difficulty as to what the report contained; but it being clear, in fact, that the trial was conducted against the Defendants as assignees, the counsel on both sides came to an understanding, at the recommendation of the Court, that the judgment of nonsuit should stand, unless the Plaintiff would take a new trial upon payment of costs.

April 28.

UPTON v. CURTIS and Another.

In *replevin* by an under-tenant against a landlord who, towards discharging the rent due from his tenant, distrained, as bailiff, of his tenant for the amount of rent due from the under-tenant to the tenant:
Held, that the tenant was not a competent witness to prove the amount of the rent due from the under-tenant.

REPLEVIN for taking the Plaintiff's goods. Avowry for 298*l.*, being one year's rent due to the Defendants, on the 16th of *April*, 1819, from *Thomas Pettman*,

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UPTON
v.
CURTIS.

man, as tenant to them, of the place in which the goods were taken. There was also a cognizance by the Defendants, as bailiffs of *Thomas Pettman*, for 30*l.*, being one year's rent, due from the Plaintiff, as tenant, to *Thomas Pettman.* But this cognizance was abandoned, on account of some inaccuracy in dates.

At the trial before the Lord Chief Baron, at the *Kent Summer* assizes, 1822, it appeared, that *William Pettman* being seised in fee of the premises occupied by the Plaintiff, demised them to him from year to year, at a rent of 20*l.* In 1814, *William Pettman* demised these premises, along with others, to *Thomas Pettman*, for a term of fourteen years, at a rent of 298*l. per annum*, and in 1816 *William Pettman* conveyed the whole in fee to the Defendants.

Thomas Pettman thus becoming the Defendant's tenant, the present distress was in fact made to recover a year's rent, due from the Plaintiff to *Thomas Pettman;* the Plaintiff, in 1814, had received from *William Pettman* notice to quit, and became tenant to *Thomas Pettman* under a new agreement; and the question was, whether under this agreement, the rent was to be 20*l.* or 30*l. per annum. Thomas Pettman*, who was called by the Defendants, proved that the Plaintiff had engaged to pay him 30*l. per annum.*

This evidence was objected to, on the ground that *Thomas Pettman* was an interested witness; but the Lord Chief Baron received the evidence, reserving the point for the consideration of this Court, and the jury found a verdict for the Defendants.

Lawes Serjt. had obtained, on the above objection, a rule *nisi* to set aside this verdict, and have a new trial; and now,

Taddy Serjt., who shewed cause against this rule, argued, that *Thomas Pettman* was not interested in the event

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event of the suit, because the verdict could not be evidence for or against him, and that he was not interested in the question put to him, because, if he increased the amount of rent to be received by the Defendants, he diminished the amount which he could afterwards claim from the Plaintiff. Whatever the Plaintiff paid the Defendants, would be deducted from any demand *Thomas Pettman* might have against the Plaintiff.

Lawes, in support of his rule, contended, that to whatever amount the Defendants recovered of the Plaintiff, to that amount *T. Pettman* would be discharged of the rent due from him to the Defendants; — it was, therefore, clearly *T. Pettman*'s interest to make the sum which the Defendants should recover of the Plaintiff larger than the sum due from the Plaintiff to *T. Pettman*. He cited *Bland* v. *Ansley*. (a)

The *Court* were of opinion, that the evidence of *T. Pettman* ought to have been excluded, and made the rule for a new trial

Absolute.

(a) 2 *N. R.* 331.

April 28.

WOOD, Demandant; ALDERSEY, Tenant.

Recovery.

ON the motion of *Heywood* Serjt., the Court permitted this recovery to pass, although the words "*their attorney*" were omitted in the warrant of attorney given by two vouchees.

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WAKEMAN v. ROBINSON.

April 29.

If one do an injury by unavoidable accident, an action does not lie; *aliter*, if any blame attaches to him, though he be innocent of any intention to injure; as if he drive a horse too spirited, or pull the wrong rein, or use imperfect harness, and the horse taking fright kills another horse. In such a case the Court refused to grant a new trial, though the judge who presided, after summing up, told the jury the Defendant was liable, even though the accident were unavoidable, and no blame were imputable to him; omitting to direct the jury to consider whether the accident was unavoidable or occasioned by any fault in the Defendant.

TRESPASS, for driving against Plaintiff's horse, and injuring him with the shaft of a gig. Plea, general issue. There was also a special plea, which was not supported by the Defendant's evidence at the trial.

The case then made out (*London* sittings after last *Michaelmas* term) was as follows.

The Plaintiff's waggon and horses were proceeding slowly along their proper side of the road towards *London*. The Defendant was coming from *London* in a gig, at the rate of seven or eight miles an hour. When the Defendant was near the Plaintiff's waggon, a coach proceeding towards *London*, approached them on the side of the road opposite to that which was occupied by the waggon. The Defendant drove between the coach and the waggon; and though in the interval there was room for two or three carriages abreast, the horse of the Defendant plunged, and running the shaft of the gig against one of the Plaintiff's waggon-horses, so injured him that he afterwards died.

The defence set up, was, that the Defendant's horse being frightened by the near, noisy, and rapid approach of a butcher's cart, became ungovernable; that the injury being thus occasioned by unavoidable accident, without any negligence or default on the part of the Defendant, he was not in any way responsible for the consequences. The weight of evidence, however, went

to

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to establish, that the Defendant's horse was young, and spirited; that he had no curb-chain; that the Defendant in his alarm, pulled the wrong rein, and that he ought to have continued a straight course, allowing the coach to pass between him and the waggon.

The learned Judge who presided directed the jury, after a full summing up, that this being an action of trespass, if the injury was occasioned by an immediate act of the Defendant, it was immaterial whether that act was wilful or accidental. He did not direct them to consider whether the accident was occasioned by any negligence or default on the part of the Defendant, or was wholly unavoidable, nor was he requested to do so by the Defendant's counsel. The jury found a verdict for the Plaintiff.

Pell Serjt. now moved for a new trial, on the ground of an alleged misdirection. He contended, that if the mischief complained of was occasioned by unavoidable accident, without any negligence or default on the part of the Defendant, the Defendant was excused on the general issue, though he might have been the immediate cause of the injury. *Gibbons* v. *Pepper* (a), *Weaver* v. *Ward*. (b) In the cases in which defendants have been held liable, though innocent of any intention to do injury, they were open to blame in some way; as for using a dangerous implement without sufficient caution; *Underwood* v. *Hewson* (c), or for being out of their proper place. *Leame* v. *Bray*. (d) In those cases, too, the question was not so much whether the Defendant was liable, as what kind of action would lie. But where no blame could attach, — as if the Defendant were driving with care a quiet horse, sufficiently harnessed, and an

(a) 1 *Ld. Raym.* 38.
(b) *Hob.* 134.
(c) 1 *Str.* 596.
(d) 3 *East*, 593.

accident

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accident should be occasioned by such a horse becoming unmanageable through sudden and accountable fright, such a defendant was not liable for the consequences; it ought, therefore, as in action for running down ships, to have been left to the jury to determine, whether or no any blame attached to the Defendant.

Vaughan Serjt., who opposed the rule, relied on *Leame* v. *Bray*, in which case *Grose* J. says, "If the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass." He also contended, that as the whole case was summed up to the jury, they had sufficient opportunity of forming an opinion as to the degree of blame which attached to the Defendant.

Pell was heard in support of his rule.

DALLAS C. J. If the accident happened entirely without default on the part of the Defendant, or blame imputable to him, the action does not lie; but, under all the circumstances that belong to it, I regret that this case comes before the Court. The action was trespass, and the trespass was clearly made out against the Defendant. It has been contended, indeed, that the Defendant would not have been liable under any form of action; but, upon the facts of the case, if I had presided at the trial, I should have directed the jury that the Plaintiff was entitled to a verdict; because the accident was clearly occasioned by the default of the Defendant. The weight of evidence was all that way. I am now called upon to grant a new trial, contrary to the justice of the case, upon the ground, that the jury were not called on to consider whether the accident was unavoidable, or occasioned by the fault of the Defendant. There

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There can be no doubt that the learned Judge who presided would have taken the opinion of the jury on that ground, if he had been requested so to do; and under all the circumstances, I am of opinion, that a new trial ought not to be granted in this case.

BURROUGH J. concurred, and the rule was

Discharged.

April 29.

PACE *v.* MARSH.

Guarantee: sufficient consideration on the face of it.

THE Defendant gave the Plaintiff the following guarantee.

"Mr. *Pace*,

"Sir,

"Mr. *Livie* having chartered your ship *Roberts*, to bring a cargo of timber from *New Brunswick*, and the same being landed to the charterer, and he having paid you one-half the freight, and given you his acceptance for the remaining half at four months date, I engage to be accountable to you for the amount of said acceptance, should it not be paid when due.

"*James Marsh.*"

Upon a motion for leave to enter a nonsuit, after a verdict had been found for the Plaintiff, *Vaughan* Serjt. objected that the consideration did not appear on the face of the guarantee so as to render it available, according to the decisions of *Wain* v. *Warlters* (*a*), *Saunders* v. *Wakefield* (*b*), and *Jenkins* v. *Reynolds* (*c*); and he endeavoured

(*a*) 5 *East R.* 10. (*b*) 4 *B. & A.* 595. (*c*) 3 *B. & B.* 14.

deavoured to distinguish the case from *Boehm* v. *Campbell.* (a)

DALLAS C. J. These are cases which turn on distinctions extremely nice, and ought not to be encouraged beyond what the law strictly warrants; because parties too frequently, by entering into such engagements, occasion extensive credit to be given, and then get out of their obligation in any way they can. I think the consideration clearly appears in the present instance, independently of cases which might be adduced in support of the guarantee; but the case of *Boehm* v. *Campbell* I cannot distinguish from the present.

PARK J. concurred.

BURROUGH J. It is plain, on the face of this guarantee, that the bill would not have been taken unless thus secured.

Rule refused.

(a) 3 *Moore*, 15.

KEZIA LATHBURY *v.* ARNOLD and Another.

April 30.

A Plaintiff in replevin, whose claim was founded on a custom to demise without deed right of common appurtenant, pleaded generally a custom to demise the right of common, and a demise according to the custom: Held, on general demurrer, that supposing such a custom good, the plea was ill on the face of it, for alleging a demise of a thing in grant without a *profert* of the deed of grant, or without alleging in lieu thereof a custom to demise without deed.

REPLEVIN for taking and detaining the Plaintiff's cow. There were several avowries and cognizances, which stated in substance, that *Arnold* was seised of a

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messuage and land in *Brackley*, in the county of *Northampton*, to which common of pasture, in the place in which, &c. called *Barnland Common*, was appurtenant; and because the said cow was wrongfully destroying the herbage on the said common, the Defendants distrained the cow, damage feasant.

To these avowries and cognizances the Plaintiff pleaded several pleas; the substance of which was, that there were sundry cottages in the borough of *Brackley*, to which there was right of common of pasture appurtenant on *Barnland* for one cow, from the *Saturday* before *Whitsunday* until the feast of *St. Martin*; and that there was a custom in the borough, that the person seised in fee of these cottages might demise the right of common of pasture either with the cottages or separate therefrom, and distinct from and independent of the actual occupation of such cottages; and that the persons accepting a demise of the cottages, or a demise of the right of common of pasture appurtenant to such cottages, separate and distinct from, and independent of, the occupation of the cottage to which it was appurtenant, might underlet or underdemise such right of common, during the time the person so underletting or underdemising was entitled to such right of common; that before the time when, &c., the archbishop of *York* and others were seised of one of these cottages with the appurtenances; and being so seised before the time when, &c., demised the same to *William Lathbury*; and that *William Lathbury*, according to the custom, underlet and underdemised the said right of common, &c., appurtenant to the said last-mentioned cottage, to have and to hold to the said *Kezia*, during the period that the said *William* was entitled to the same; wherefore she turned her cow on the place in which, &c.

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To these pleas there was, first, a general demurrer, and then a special demurrer, assigning for cause that it did not appear that *William Lathbury* had underlet or underdemised the right of common by any deed or instrument under seal, or by any sufficient writing or conveyance, or that any such deed or conveyance was brought into court, or that the said *Kezia* ever became legally entitled to the right of common. Joinder in demurrer.

On these pleadings it was intended to raise the question, whether a custom to demise by parol an incorporeal hereditament (such as a right of common) could be supported at law. But the judgment of the Court turned only on the point, whether, supposing such a custom to be good, (as to which no opinion was delivered,) it was sufficient, in a plea in bar to an avowry, to allege that the lessor, under such a custom, *demised*, instead of alleging that he "*demised without deed*;" or to allege the custom as a custom *to demise*, instead of alleging it as a custom *to demise without deed*: as to which,

The Court offered to permit the Plaintiff to amend; but she having refused this, on account of the expence (for the pleadings were very long),

Taddy Serjt. now contended, that the pleas in bar were sufficient. The Plaintiff has alleged the custom to demise generally, without saying whether by deed or parol; and this she may do, for it is only matter of inducement, which need not be stated with more particularity. Having so stated the custom, it is sufficient to allege the demise to be according to the custom; and it would have been inconsistent with the former statement to allege a demise by deed. So that the cause of objection assigned in the special demurrer, namely, that there is no profert of a deed, is irrelevant; for, as the

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foregoing part of the pleas is framed, there is no reason why the Plaintiff should allege a deed: the objection should have been, that the custom is not stated with sufficient certainty; that the matters demiseable lying in grant, the Defendants might expect a deed to be produced at the trial, and yet under the general allegation of the custom, the Plaintiff might be permitted to prove a custom to demise by parol. But this is not the objection made on the special demurrer; and on the general demurrer it cannot be raised, because the pleas are consistent on the face of them. In debt for rent, the Plaintiff alleges that he demised, without saying how; so also, in an action on a composition for tithes, it is not usual to state any contract by deed, though the tithes lie in grant only. [*Burrough* J. Those actions proceed on the contract to pay a composition, and not on any grant.] In *Bellamy*'s case (*a*) it was holden, there need not be a profert of the deed of licence where the licence was executed; therefore, there is nothing incongruous in alleging a demise of a thing in grant generally, without saying by deed; especially where the mode of demise is not the gist of the action, but only comes in question incidentally, and where a *primâ facie* title or mere colour of right is sufficient to support the action. As between the lord and a commoner, greater strictness may be required, but as between one commoner and another, it is sufficient if the Plaintiff has a colour of right. *Hall* v. *Harding*. (*b*)

Taddy also argued at length, and cited various authorities towards establishing the validity of the custom; but they are omitted here, as no judgment was given on the point.

With respect to the pleas, the Court thought them ill, even on general demurrer, for want of precision; in-

(*a*) 6 *Rep.* 38. (*b*) 1 *Bl. Rep.* 673.

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asmuch as the demise being of a thing in grant, nothing could excuse the omission of the profert of a deed but the allegation of a custom to demise without deed.

Judgment for the Defendant.

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May 2.

Where the Defendant, after surrendering in discharge of his bail, in an action in the CommonPleas, was committed to criminal custody for a misdemeanor, and continued in such custody, the Court would not discharge him from the action because the Plaintiff had omitted to charge him in execution within two terms after his surrender.

The Court of Common Pleas has no jurisdiction to bring a Defendant up out of, because it has none to remand him to, a criminal custody.

THE Defendant surrendered in discharge of his bail in this action on the 20th of *November*; he was shortly afterwards removed in criminal custody for a misdemeanor to the new prison, *Clerkenwell*, and remained there, charged with this and other actions; but not charged in execution in this action. In *Hilary* term, he was brought up by *habeas corpus* into this court from *Clerkenwell* prison, and was charged in execution in another action of *Brookes* v. *Weston*.

Pell Serjt., on a former day in this term, obtained a rule calling on the Plaintiff to shew cause why the Defendant should not be discharged out of the custody of the keeper of the new prison, *Clerkenwell*, as to this action, the Plaintiff not having proceeded to charge the Defendant in execution in due time.

Onslow Serjt., who shewed cause against the rule, cited *Hodgson* v. *Temple* (*a*), *Walsh* v. *Davies* (*b*), and *Bennett* v. *Kinnear* (*c*), to shew that, though it might be otherwise in the King's Bench, by virtue of the extensive jurisdiction of that court in criminal matters,

(*a*) 1 *Marsh.* 166. (*b*) 2 *N. R.* 245. (*c*) 3 *Moore*, 259.

 this

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this court had no jurisdiction to bring up the Defendant out of a criminal custody for the purpose of being charged in execution, and then to remand him; if so, there had been no laches on the part of the Plaintiff. He insisted that in *Brookes* v. *Weston* this had been done inadvertently, and without the attention of the Court having been called to the difficulty. (To this the Court assented.)

Pell, in support of his rule, urged that the Defendant should, according to the rules of the court, have been charged in execution within two terms; that he might have been brought up to be so charged, because, as *Pell* asserted, he had been so brought up and charged in the Court of King's Bench in an action pending there. If, however, it should be thought the Court of Common Pleas had not the same jurisdiction in such a matter as the Court of King's Bench, then the Plaintiff ought, under the circumstances, to have applied for further time to charge the Defendant in execution; and it would have been granted to him in the same way as it is granted to sheriffs, when occasion requires, to extend the return of a writ.

Cur. adv. vult.

DALLAS C. J. This is a rule calling upon the Plaintiff to shew cause why the Defendant should not be discharged out of the custody of the keeper of the new prison, *Clerkenwell*, as to this action, the Plaintiff not having proceeded to charge the Defendant in execution in due time. This application proceeds upon the notion, that as he has not been charged in execution in due time, he ought to be discharged; but if his not having been charged in execution has not been occasioned by the *laches* or wilful delay of the Plaintiff, it follows that the ground of the application fails. Has there then been any laches on the part of the Plaintiff?

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It appears that this Defendant, after being surrendered before Mr. Justice *Park*, in discharge of his bail, was removed first to the *King's Bench* prison, and afterwards to *Clerkenwell* prison, and sentenced to an imprisonment for crime; which imprisonment is still continuing. Now, in order to charge a man in execution, the custody must be changed to the prison of this court. Could the Plaintiff do this without the assistance of this Court? Certainly not. The Court itself has no such power; for it was settled in *Walsh* v. *Davies* (*a*), where all the authorities were weighed, and considered, that where a Defendant is in criminal execution, this Court cannot charge the Defendant in a civil action; for it cannot change the custody, and then commit the Defendant again upon the criminal matter. It is true, that was only the case of charging him with a declaration; but a Defendant is equally entitled to a discharge if not charged with a declaration in due time, as he is if not charged in execution in due time; and if not entitled to be discharged in the one case, he cannot be in the other.

What the Court of King's Bench, as the first court of criminal jurisdiction in the kingdom, has done, or may do, in cases of this kind, cannot apply here; for in such cases the *habeas corpus* is taken out on the crown side of that court; and it has been long decided that it could only be taken out on the crown side. We have been pressed with the argument, that the Plaintiff should have applied to the Court to extend the time for charging him in execution. But that can only be necessary to excuse what, if the Court did not interpose, would be deemed laches on the part of the Plaintiff; but having shewn that the Plaintiff could not do any thing, and that the Court could do nothing to assist

(*a*) 2 *New Rep.* 246.

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him, any application to the Court would have been useless. But it is said, the Court in one instance have charged this very Defendant since the criminal custody commenced; be it so: this has passed with the officer of the court inadvertently, and he admits it was wrong. But even suppose the matter had been done by the Court itself, the attention of the Court not being drawn to it, it can form no precedent; and probably the Court may, upon proper application, discharge that order, as having been improvidently made; but on this we mean to give no opinion.

The Court wished to shew the grounds of their judgment; but the very certificate of causes of detainer returned by the keeper of the *Clerkenwell* prison, and the rule of B. R. upon it, prove the propriety of the decision; for the rule states, that when the said *John Weston* shall have paid the said fine of 100*l.* he shall be redelivered into the custody of the marshal, charged with the said action as aforesaid, and with the several other matters mentioned in the said return; of which, the case of *Freeman* v. *Weston* is one. This rule must, therefore, be

Discharged.

The Court afterwards, on the motion of *Pell* Serjt., discharged the rule granted in *Brookes* v. *Weston* for charging the Defendant in execution in that suit.

BARFORD, Administrator of N. PITTS, v. STUCKEY.

May 3.

A. and *B.*, by a deed, (reciting that *C.* had left them considerable property in strict settlement, with remainder over, on failure of issue male of *A.* and *B.*, to *D.*, a lieutenant of marines, but had made no other provision for *D.*,) agreed with *D.*, his executors and administrators, to pay him an annuity for twenty-one years, if *A.* and *B.*, or the survivor of them, should so long live; and in case *D.* should die within the term, to his child or children, if any, in such proportions as *D.* should appoint, or in default of appointment, to all of them equally; and if there should be no child, to his wife, if she should remain a widow.

D. covenanted that, if he or his children should come into the property left by *C.*, they would refund all that might have been received under the annuity.

D. having died within the term, and also his only child, and wife:

Held, that *D.*'s administrator was not entitled to claim payment of the annuity after their deaths.

DEBT on an annuity deed, which being set out on oyer, was in substance as follows:

An agreement made and entered into the 11th day of *May*, 1810, between *Barnaby John Bartlett* and *Vincent Stuckey*, of the one part; and *Nathaniel Pitts*, a lieutenant in his majesty's royal marine forces, of the other part. Whereas *John Stuckey*, Esq., deceased, did, in and by his last will and testament in writing, bearing date the 8th day of *January* last, give and devise unto *Abraham Follett* and *Thomas Stocker* therein named, and to their heirs, certain manors, messuages, farms, lands, and hereditaments in his said will particularly expressed; to hold the same unto the said *Abraham Follett* and *Thomas Stocker*, and their heirs, to the use of the said *Barnaby John Bartlett*, and his assigns, for life; remainder to the use of the first son of the body of the said *Barnaby John Bartlett* lawfully begotten; and in default of such issue, remainder to the use of the second, third, fourth, fifth, and all other the sons of the said *Barnaby John Bartlett* lawfully begotten, and their heirs; and in default of issue male of the said *Barnaby John Bartlett*, remainder to the use of the said *Vincent Stuckey* and his assigns for life; remainder to the use of the first

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son of his body lawfully begotten; and in default of such issue, remainder to the use of the second, third, fourth, fifth, and all other the sons of the said *Vincent Stuckey* lawfully begotten, and their heirs; and in default of issue male of the said *Vincent Stuckey*, remainder to the use of the said *Nathaniel Pitts*, and his assigns, for life, with divers remainders over: and the said *John Stuckey* did, in and by his said will, also give and devise unto the said *Abraham Follett* and *Thomas Stocker* certain other messuages, farms, lands, and hereditaments in his said will also particularly expressed; to hold the same unto the said *Abraham Follett* and *Thomas Stocker*, and their heirs, to the use of the said *Vincent Stuckey*, and his assigns, for his life; remainder to the use of the first son of his body lawfully begotten; and in default of such issue, remainder to the use of the second, third, fourth, fifth, and all other the sons of the said *Vincent Stuckey* lawfully begotten, and their heirs; and in default of issue male of the said *Vincent Stuckey*, remainder to the use of the said *Barnaby John Bartlett*, and his assigns, for life; remainder to the use of the first son of his body lawfully begotten; and in default of such issue, remainder to the use of the second, third, fourth, fifth, and all other sons of the said *Barnaby John Bartlett* lawfully begotten, and their heirs; and in default of issue male of the said *Barnaby John Bartlett*, remainder to the said *Nathaniel Pitts* and his assigns for life, with divers remainders over: and, whereas, in regard that the said *John Stuckey* did not, in and by his said will, make any further or other provision for the said *Nathaniel Pitts*, and in consideration of the great regard and esteem which the said *Barnaby John Bartlett* and *Vincent Stuckey* have for, and bear towards the said *Nathaniel Pitts*, they, the said *Barnaby John Bartlett* and *Vincent Stuckey*, have agreed to grant him an annuity of 500*l.* per annum for the term of 21 years, in

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case they should so long live and in the event of either of their deaths within the said term, then if the survivor shall so long live, and be in actual possession of all the said settled hereditaments: to commence from the 25th day of *March* last, and to be paid half yearly: and in case of the death of the said *Nathaniel Pitts* before the expiration of the said term of 21 years, they, the said *Barnaby John Bartlett* and *Vincent Stuckey*, have further agreed that they, or the survivor of them, will pay the said annuity for the term aforesaid, subject as aforesaid, to and for the use and benefit of the child or children of the said *Nathaniel Pitts*, if any, in such proportions as he the said *Nathaniel Pitts* shall by deed or will appoint; and in default of appointment, for the benefit of all his children equally; but in case there shall be no child of the said *Nathaniel Pitts* living at the time of his decease, happening within the said term, then the said annuity to be paid in like manner, for the then remainder of the said term of 21 years, in case the said *Barnaby John Bartlett* and *Vincent Stuckey*, or the survivor of them, shall be then living, unto his present wife, for and during such period only as she shall continue his widow: which said annuity of 500*l*., it is agreed, shall be paid in the proportions following, that is to say, 350*l.* as and for the said *Barnaby John Bartlett*'s share thereof, and 150*l.* as and for the said *Vincent Stuckey*'s share thereof: and it is also agreed, that if on the death of the said *Barnaby John Bartlett*, or *Vincent Stuckey*, within the said term, the survivor of them shall be in possession of the said manors, messuages, hereditaments, and premises, then the said annuity shall be paid as before stipulated, by such survivor, for the then remainder of the said term of 21 years, in case such survivor shall so long live; but in case the said *Nathaniel Pitts*, or his heirs, shall, at any time during the said term, come into possession of the said manors, messuages, farms, lands, and

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and hereditaments, under the limitations in the will of the said *John Stuckey* expressed, or shall otherwise, by operation of law, obtain or get into possesssion of the hereditaments so by the will of the said *John Stuckey* devised, that then the said annuity is to cease and be utterly void; and then, in either case, the said *Nathaniel Pitts*, his heirs, executors, or administrators, are to repay to the said *Barnaby John Bartlett* and *Vincent Stuckey* respectively, and to the survivor of them, their and his executors and administrators, in the proportions aforesaid, all sums of money by him, the said *Nathaniel Pitts*, his children or wife, received for or on account of the said annuity: now, therefore, this agreement witnesseth, that for the considerations aforesaid, they, the said *Barnaby John Bartlett* and *Vincent Stuckey*, do hereby, for themselves, severally and respectively promise and agree to and with the said *Nathaniel Pitts*, his executors or administrators, that they, the said *Barnaby John Bartlett* and *Vincent Stuckey*, shall and will, during the said term of 21 years, to commence as aforesaid, in case they shall so long live, well and truly pay, or cause to be paid, unto the said *Nathaniel Pitts*, or in case of his death within the said term, then unto or for the use of his child or children, if any, but if not, then unto his present wife, in case she shall continue his widow, one annuity or clear yearly rent, or sum of 500*l.*, in the proportions and shares hereinbefore mentioned, by two equal half-yearly payments, on the several days and times hereinafter mentioned, that is to say, the 29th day of *September* and the 25th day of *March*, in each and every year, together with a proportionate part of the said annuity, up to the time of the decease of the survivor of them, the said *Barnaby John Bartlett* and *Vincent Stuckey*, in case they shall both die before the expiration of the said term of 21 years, and such survivor shall hap-

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pen to die between any of the said half-yearly payments, or before a full half-yearly payment shall become due and payable, without any deduction, defalcation, or abatement of any sort or kind, parliamentary or otherwise whatsoever; the first payment thereof to be made and begin on the 29th day of *September* next ensuing the date hereof: and the said *Nathaniel Pitts*, for himself, his heirs, executors, and administrators, doth hereby promise and agree to and with the said *Barnaby John Bartlett* and *Vincent Stuckey*, and the survivor of them respectively, and with their respective executors and administrators, that in case he, the said *Nathaniel Pitts*, or his heirs, shall, at any time during the said term, come into possession of the said manors, messuages, farms, lands, and hereditaments, under or by virtue of the limitations in the will of the said *John Stuckey* expressed, or shall otherwise, by operation of law, obtain possession of the hereditaments by the will of the said *John Stuckey* devised; then, that he, the said *Nathaniel Pitts*, his heirs, executors, or administrators, shall and will immediately thereupon well and truly pay, or cause to be paid, unto the executors or administrators of the said *Barnaby John Bartlett* and *Vincent Stuckey*, or the survivor of them respectively, in the proportions aforesaid, all and every sum and sums of money received by him, his said children, or wife, for or on account of the same annuity. In witness whereof, the said *Barnaby John Bartlett*, *Vincent Stuckey*, and *Nathaniel Pitts*, have hereunto set their hands and seals, the day and year first above written.

Averments: that *Nathaniel Pitts* died within the term, intestate and without making any appointment; that *Martha Elizabeth Pitts*, his only child, afterwards died within the term, intestate and without making any appointment; that the wife of *Nathaniel Pitts* also died within the term, in the life-time of *Nathaniel Pitts*; that the

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the Plaintiff took out administration of the effects of *Martha Elizabeth Pitts* and of *Nathaniel Pitts*; and that three half-yearly payments of the annuity were in arrear. General demurrer and joinder.

This case was argued twice. By *Taddy* Serjt. for the Defendant, and *Lens* Serjt. for the Plaintiff, in *Trinity* term, 1822; and by *Peake* Serjt. for the Defendant, and *Bosanquet* Serjt. for the Plaintiff, in this term.

Arguments in support of the demurrer. Where there is any doubt, a deed must be construed most strongly against the grantor; and his intention must be collected, not from any particular expression, but from the whole of the deed taken together. *Roe d. Wilkinson* v. *Tranmer* (*a*), *Payler* v. *Homersham* (*b*), *Nind* v. *Marshall.* (*c*) But taking the whole of this instrument together, it is clear the grantors meant to confine the annuity to the persons named in the deed: for those persons, individually, the grantors were anxious to make a provision, because they had been disappointed of property which came to the hands of the grantors. The annuity, therefore, is granted to *N. Pitts*, with power, not to sell, but to dispose of it among his children; he could not dispose of it to a stranger after his life, neither will the law. Though the grantors agree with *N. Pitts* and his executors, in order to the due discharge of any arrears that might be due at the death of *N. Pitts*, the agreement is, that they will pay, not *N. Pitts* and his executors, but *N. Pitts* and such children, if any, as he shall appoint — such children — not such children and their executors; and in default of children, the widow — not the widow and her executors, but the widow only — during her widowhood. If a child, after the death of the father, had taken an absolute interest during the term, and had

(*a*) 2 *Wils.* 75. (*b*) 4 *M. & S.* 426. (*c*) 1 *B. & B.* 319.

died

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died before the mother, the annuity, instead of going over to the mother, might have gone to the executor of the child. It is clear, therefore, that the intention of the grantors was, not to pay the annuity at all events during the term, but only in case the parties for whom they were solicitous, should so long live, and should not become possessed of the estate of which they had been disappointed. The clause under which they are to repay what they have received, in case they become possessed of that estate, is conclusive in favour of this construction.

Arguments for the Plaintiff. The covenant is with *N. Pitts* and his executors, to pay him an annuity during a term of 21 years; and if he dies, to pay his children or his widow. The covenant is not, to pay during 21 years if the parties shall so long live, but to pay absolutely to them, in a certain order of succession. This, therefore, is an absolute interest in *N. Pitts;* and as such, vests in his executor on his death, (*Gosley* v. *Gilford* (*a*) and the authorities therein contained,) unless the deed contain some clause of cesser, or some stipulation specifying an event on which the grant is to cease. Such an event, indeed, is specified in the deed, namely, the event of the grantees' coming into possession of certain property; but that event has never happened, and the annuity must therefore be paid.

DALLAS C. J. It is admitted, that this is a question of intention only, to be collected from the words of the deed taken all together, and considered with reference to the object of the deed; and that there is no reported case which applies particularly to the present. Looking at the whole deed, I think the grantors intended that

(*a*) 2 *Vern.* 35.

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this should be an annuity or provision for the family described in the deed, and that, therefore, the annuity has now ceased. The annuity is to be paid, first, to *Nathaniel Pitts*; then, in case of his death, to his child or children, if any, in such proportions as *N. Pitts* should appoint; and for default of appointment, to all of them equally; and if there should be no child, to the widow during her widowhood. By the death of *N. Pitts* and his widow without surviving issue, all the events to which the covenantors looked for the termination of the interest of the grantees have happened; and I can find no express words from which it can be taken that the annuity was to continue beyond their lives.

PARK J. From the circumstances stated in the deed, it appears that the deceased having been disappointed of property which he had reason to expect, the grantors generously agreed to provide for him by settling an annuity; but that their beneficence was particularly directed towards him and his family, if he should have any, is manifest from the circumstance, that the wife was not to enjoy the annuity unless she outlived the child or children. But this limitation of the grantors' intentions is put out of doubt by the clause for repayment of the sums received, in case the grantees should come into possession of the property of which they had been disappointed.

BURROUGH J. I doubted at first whether the limitation of the annuity to *N. Pitts'* child or children did not carry the interest beyond them: I am now satisfied I was wrong in that respect. It is usual indeed, in instruments like the present, to introduce clauses of cesser: but they were not necessary here; because, looking at the provisions of the deed, it is clear upon what

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events the annuity was to cease. There is no addition of executor or administrator after the words "child or children," so that the grant to them is clearly personal, and cannot be carried further. The repayment stipulated, is also wholly personal, being only of such monies as *N. Pitts*, his children, or wife should have received. If there had been no next of kin, a creditor might have taken out administration to any one of these parties, but it was clearly no part of the grantor's intention to benefit creditors, or any person but *N. Pitts* and his family. There must be

Judgment for the Defendants.

BUTLER v. BULKELEY and Others.

May 6.

Judgment is not final on the officer's marking the record, but on his completing the taxation of costs.

IN this case the *posteà* had been marked for judgment by the officer of the court, but the costs had not been taxed, when *Lens* Serjt. obtained a rule *nisi* to amend the declaration issue and *Nisi Prius* record.

Pell Serjt. shewed cause against the rule. It being clear that an amendment cannot be made after final judgment (*a*), the only question is, whether judgment is final on the officer of the court marking the *posteà*, or on his taxing costs. The mark on the record seems to be the appropriate and distinguishing indication of the *fiat* of the court; but in *Blackburn* v. *Kymer* (*b*) it appears to have been thought that judgment is not final till the prothonotary's *allocatur* is completed by the insertion of the amount of the costs.

(*a*) See *Wray* v. *Lister*, 2 *Str.* 1110. (*b*) 1 *Marsh.* 278.

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The Court were of this opinion; and, on payment of costs, made the rule

Absolute.

May 6.

WILLIAMSON v. HENRY MICHAEL GOOLD.

Where, upon the grant of an annuity the agent of the grantee, on paying the consideration money, retained, or caused to be returned to him, a considerable sum for the expense of deeds, investigating title, journeys, &c., (two witnesses, brought from a considerable distance for the purpose of attesting the annuity deed, having first retired,) the Court held this an illegal retainer, for which the grantee was responsible, and on that ground set aside the annuity ten years after it had been granted and acted on, though the grantee alleged that he had given no authority for, and was ignorant of, such retainer.

LENS Serjt. moved for a rule *nisi* to set aside an annuity granted by the Defendant, and a judgment and all other securities by which it was secured. The motion was made on the ground of an alleged defect in the memorial, (upon which the Court gave no opinion,) and an alleged retainer of part of the consideration money, as disclosed in an affidavit of the Defendant, which was in substance as follows:

That, in *September*, 1813, the Defendant being pressed for the payment of 2290*l.* due from him on former annuities, which had been negotiated for him by *Edward Howard*, and also being indebted to *Howard* 400*l.* on his private account, authorised *Howard* to procure for him 3130*l.* more, for which he was to pay during his own life, 14¼ *per cent. per annum*, and to allow *Howard* 10 *per cent.* for procuration: that out of this sum *Howard* was to pay 2290*l.* to certain persons to whom annuity arrears were due, and to retain 400*l.* and interest towards the discharge of his own debt: that on the 22d *December* following, *James Gibbs*, who about that time entered into partnership with *Howard*, came to the Defendant at *Stroud*, in *Gloucestershire*, with securities for the Defendant's signature, in which the

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consideration money for the annuity was expressed to be 4130*l.*: that upon the Defendant's expressing his surprise at the sum being 4130*l.* instead of 3130*l.*, *Gibbs* accounted for the difference by stating, that upon taking the account of the sums due from the Defendant, they were found to amount to 1000*l.* more than had been expected, and that *Howard* had, therefore, increased the loan to 4130*l.* on the same terms: that *Gibbs* declared himself the agent of *Williamson* the Plaintiff: that the Defendant being threatened by *Gibbs* with legal proceedings for debts due from him, did after some hesitation execute the securities: that *Gibbs* thereupon produced and laid out upon the table 4130*l.* in bank of *England* notes, and then indorsed the numbers of them upon one of the deeds: that *Gibbs*, then as agent of *Williamson* the Plaintiff, took from these notes the sum of 2290*l.* before mentioned, and 400*l.* with interest due to *Howard*, together with another sum of 450*l.*, 413*l.* whereof *Gibbs* declared was due to *Howard* for procuration or commission money, and for costs in preparing the deed, at the rate of 10 *per cent.* on 4130*l.*, and the residue of the 450*l.* was for the travelling expenses and trouble of *Gibbs* and two other persons who accompanied him to *Stroud* to witness the execution of the deeds: that *Gibbs* thereupon, as agent of *Williamson*, paid over to the Defendant 990*l.* or thereabouts, the balance remaining; and that *Howard* and *Gibbs* were never agents to the Defendant.

In answer to this, there were affidavits from the Plaintiff, from his attorney, from *Gibbs*, from *Whitehead* one of *Howard*'s clerks, and from *Berry*, (one of the witnesses who attended at the execution of the deed,) which contradicted the preceding affidavit in the following particulars. That the Defendant did authorise *Howard* to raise 4130*l.*: that *Howard* did not stipulate for, or have 10 *per cent.* or any other sum for procuration or com-

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mission money: that the numbers of the notes were not indorsed on the deed in the Defendant's presence at *Stroud*, but in *London*, before *Gibbs* started: that only 350*l.* was deducted for the expence of the deed, and of *Gibbs*'s journey: that the Defendant never objected to this charge: that no threat of legal proceedings was ever made: that *Berry* and *Gibbs* saw the Defendant (in the presence of his brother, Sir *George Goold* (put the whole of the consideration into his pocket, and then *Berry* retired with the other witness: that the Plaintiff, who had been applied to by *Howard* to purchase a portion of the annuity to be granted by the Defendant, and who paid, or caused to be paid to *Howard* 805*l.*, to purchase an annual sum of 115*l.*, parcel of that annuity, never authorised the retainer of any part of the consideration money; and that to the best of the Plaintiff's knowledge and belief, none of the consideration money was retained by *Gibbs*.

It further appeared, that the Defendant had twice taken advantage of the insolvent debtor's act, and had enumerated this annuity as a valid debt in his schedules: and that, last term, the Defendant's surety was ordered to be discharged on paying the balance that was due according to the terms of the deed. It was sworn by *Gibbs* that the charge of 350*l.* was reasonable, but the particulars of which it was composed were not shewn.

Vaughan and *Taddy* Serjts. shewed cause against the rule, and after some discussion as to the objection to the memorial, and the credit due to the Defendant's affidavit, argued to the following effect against setting aside the annuity on the ground of an undue retainer.

Nearly ten years have elapsed since this annuity was granted; but the Courts have often expressed a wish to put some limit on the time for making motions such as the present, analogous to the limitations imposed on

 Plaintiffs

Plaintiffs in actions at law, *Ex parte Maxwell.* (*a*) An annuity has never been set aside after such a length of time as this, upon objections resting merely upon the relation of parties or witnesses, and not appearing on the face of the instrument. In *Drake* v. *Rogers* (*b*), where an annuity was set aside after a period longer than ten years, the defect appeared on the face of the memorial, and the whole transaction was tainted with fraud. The Court, therefore, will require a very clear case to be made out, and exercise great caution before they decide. Nor will they consider the length of time alone, but also, what has been done under the instrument. The grantor, instead of complaining, has always acted on it as a valid instrument: he has twice taken advantage of the insolvent debtor's act, and has enumerated the annuity among the debts in his schedule. The Defendant's surety obtained an order to be discharged last term, only on the condition of his paying the balance according to the provisions of the deed. [*Per Curiam:* he asked for no more.] But he will now be entitled to say, that he cannot be detained for that balance, because all the deeds are to be set aside. There was no undue retainer here, even by *Gibbs*, for 350*l.* is sworn to be the fair charge for preparing the deeds, and for journeys, and the returning money to pay the attorney's bill, is the fulfilment of a previous contract with him, which has been expressly holden to be allowable, *Monys* v. *Leake.* (*c*) Even admitting that there was an undue retainer by *Gibbs*, the precise words of the statute 53 *G.* 3. *c.* 141. *s.* 6. are, "if any part of the consideration shall be returned to the person advancing the same, or retained, the Court may order the deeds to be cancelled." Now, *Williamson* the Plaintiff, was that person; but it is not pretended that any money was re-

(*a*) 2 *East*, 85. (*b*) 2 *B.* & *B.* 19. (*c*) 8 *T. R.* 411.

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turned to, or retained by him. In order to make out a retainer as against *Williamson*, the Defendant must shew that *Gibbs* was *Williamson*'s agent for that purpose; but no such authority is shewn, and *Williamson* swears that nothing was retained to his knowledge. It may be urged, there is an implied authority from *Williamson*: but if there be an implied authority, it can only be implied from the nature of a transaction; and in the present instance, the nature of the transaction implies the very contrary. It cannot be implied that *Gibbs* was agent to do that which would set aside the transaction in which he was employed. The consequences of such a doctrine would be extensively fatal to many innocent persons.

The Court desired to hear *Lens* in support of his rule, on one point only, namely, whether there was any case in which the courts had interfered after ten years, where the objection did not appear on the face of the memorial.

Cross Serjt., who was with *Lens*, mentioned *Gowland* v. *De Faria* (a), where there had been a lapse of 25 years. But *Taddy* contended, that that case proceeded on the general jurisdiction of equity, and could not afford any guide for the decision of a court of law.

DALLAS C. J. The only point on which we think it necessary to come to a decision, is, whether or no any part of the consideration for this annuity has been unduly retained: if it has been retained by the grantee, there is an end of the question; and there is equally an end of the question if it has been retained by an agent of the grantee, duly authorised for the payment of the consideration. But it is necessary here to distinguish

(a) 17 *Ves.* 24.

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between the conduct of *Gibbs* and that of *Williamson*, for, if the question depended on the conduct of *Gibbs* only, there could be no doubt. We must reduce the matter to the plain test and standard of common sense: when a man who negotiates, and profits by negotiating an annuity, goes to a distance with two witnesses prepared for the purpose, who just see the signature of the grantor and immediately retire, and then a large sum out of the consideration money is taken back for the expense of deeds and journies, is this such a payment as the statute requires? I think not; and we need not wander into the details of the affidavits for other circumstances to impeach the fairness of the transaction. Taking it upon *Gibbs's* affidavit only, this is not a payment of the consideration; and, therefore, it is unnecessary to consider the inconsistencies or contradictions which it is alleged, are to be found in the affidavit of *Goold*. But is *Williamson* responsible for the conduct of *Gibbs?* No doubt, a man may employ an agent for lawful purposes, and if the agent exceeds his commission and acts unlawfully, the principal will not be responsible; nor is there any difference in that respect between this and other cases of agency; but, suppose a person at *Edinburgh* appoints an agent here to pay over the consideration for an annuity, it must be proved to have been duly paid over by the grantee or his agent, to the grantor or his agent: and here I found my opinion on the affidavit of *Williamson;* he is the grantee in this case, and *Gibbs* is his agent for the purpose of making payment; to a certain extent he is also the agent of *Goold;* in fact, he is the common agent of both parties, and has duties to perform to both: now, *Williamson* should make out that he paid to *Gibbs* in money or notes the amount of the consideration money, with instructions for *Gibbs* to pay it to the grantor; instead of this, he merely says, he paid or caused to be paid, without

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further particulars. The words of the act are, "if any part of the consideration shall be returned or retained, the Court may order the deeds to be cancelled:" he swears that no money was *retained* to his knowledge, but not, that none was *returned*. If, as appears to have been the case, he had general dealings with *Gibbs*, this was no more a payment to *Goold*, than the mere passing of a sum in account with an agent would have been a payment. The case in *Vesey* is an answer to the objection with respect to the time that has elapsed since the annuity was first acted on; and are we to suffer a grant thus fraudulently obtained, to go on, when probably the same distress which led to the original borrowing has occasioned the delay in this application? The rule must be made absolute, on the terms of an account being taken by the prothonotary to ascertain what is due for principal and interest, and the grantor's paying the balance in arrear.

PARK J. I am of the same opinion, and had no doubt on the case till the argument was urged as to the lapse of time. With respect to that, where there is no particular hardship in the case, and the grantee and witnesses are dead, the courts will not set aside the annuity after a great lapse of time. In *Ex parte Maxwell*, Lord *Kenyon* says, "during the life of the grantee no objection was taken to the annuity, and the interest was regularly paid; and this has continued to be done for near seven years since his death." But in *Drake* v. *Rogers*, eleven or twelve years had elapsed; and though there was an objection on the face of the memorial, the Court decided chiefly on the circumstances of the case, and set aside the annuity though all the witnesses were dead; there is, therefore, no such rule as the Plaintiff's counsel has contended for; but each case depends on its own peculiar circumstances; and there can

can be no doubt on these affidavits, that the present has been a case of fraudulent dealing. The parties interested swear most guardedly: they assert that no money was *retained*, but they cautiously avoid saying that none was *returned;* and though it is stated, that the grantor put the money in his pocket, it is evident this was only for the purpose of enabling the witness to make such a colorable statement, since it was immediately taken out again: *Gibbs* admits that he received 350*l.*, and gives no account whatever of the particulars of the charge. The rule, therefore, must be made absolute, on an account being taken of what is due for principal and interest.

BURROUGH J. Parliament has imposed upon us the duty of watching these proceedings most narrowly. If the principal will not look to his own business in an affair of such importance, he must suffer for his neglect; the agent stands in his place, and the principal must be responsible for the due payment of the consideration money. The act says, the money must be *bonâ fide* paid: was this so here? The witnesses retire, and *Gibbs* and *Goold* are left together; *Goold* says, that 450*l.* was retained, and *Gibbs* admits 350*l.*, which, he says, was for the expense of deeds and investigating title; but no bill of costs is produced, nor any thing to justify the charge. The impression on my mind is, that this money has been improperly retained, and the annuity must therefore be set aside.

Rule absolute to set aside the annuity, on an account being taken, and on the Defendant's paying what may be found due for principal and lawful interest.

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May 6.

SKEEN v. M'GREGOR.

Affidavit to hold to bail: what sufficient on a debt on charter party.

THE affidavit to hold to bail in this case was, "that *Gregor M'Gregor* is justly and truly indebted unto *Lawrence Skeen*, of *Leith*, in the sum of 499*l.* 10*s.*, upon and by virtue of a certain charter-party of affreightment, bearing date 15th *January* last, for and on account of the hire of a certain ship or vessel called the *Skeen*, let to hire by the said *Lawrence Skeen* to the said *G. M'G.*, and by him taken for a certain voyage from the port of *Leith* to *Poyais;*" and deponent further saith, that no tender or offer hath been made by or on behalf of the said *G. M'G.* to pay the said sum, &c.

Lawes Serjt. moved to discharge the bail on the ground that this affidavit was insufficient, as stating a debt arising on a charter-party, but not alleging that there had been any breach of the stipulations which that charter-party contained: he referred to *Hatfield* v. *Lingard* (*a*), *Stinton* v. *Hughes* (*b*), and *M'Pherson* v. *Lovie* (*c*), where the cause of action arising on the breach of a contract, it was holden, that a breach ought to be shewn in the affidavit to hold to bail.

But the Court thought the allegation that the Defendant was indebted for the hire of a ship in a sum which he had not paid, was sufficiently certain, and

Refused the rule.

(*a*) 6 *T. R.* 217. (*b*) 6 *T. R.* 13. (*c*) 6 *B. & A.* 108.

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CANNAN and Others *v.* MEABURN and Others.

May 7.

The captain of a ship, which was about to sink from the effects of bad weather, put into a port short of his destination, and thinking that the expense of repairs would frustrate the ship owner's adventure, sold the cargo under the order of a Vice-admiralty Court, though he might have forwarded it to its destination by another vessel, and might have repaired his own ship: Held, that he ought either to have forwarded the cargo or have repaired his own ship; that he had no authority to sell the cargo, and that his owners were liable to the owners of the cargo for the non-delivery thereof, though the bill of lading stipulated only for a conveyance, "the dangers and accidents of the seas and of navigation of what kind soever excepted."

CASE against the Defendants, as carriers by sea, for breach of duty, in not delivering at their place of destination 72 chests of indigo, consigned to *London*. The declaration also contained a count in trover, for the unlawful conversion of the indigo. At the trial before *Dallas* C. J. and a special jury, *London* sittings after *Michaelmas* term, 1822, the facts were as follow:

The Defendants, owners of the ship *Lady Banks*, had, by their captain, engaged, under a bill of lading, to convey the Plaintiffs' indigo from *Calcutta* to *London*, the dangers and accidents of the seas and of navigation of what kind soever (save risk of boats, so far as ships are liable thereto, excepted.) The captain sailed from *Calcutta* in *December*, 1820, and after encountering much bad weather, put into *Trincomalè*: it was there found that the ship had sustained considerable damage; but 1000*l.* having been laid out in repairs, she proceeded on her voyage, when, after encountering a succession of gales of wind, she arrived in a sinking state at the *Mauritius*, on the 25th of *March*, 1821. There the captain, finding (as he himself stated upon the trial) that the expence of repairing the ship would be 30,000 dollars, an expense so great as to frustrate the whole adventure, and being at a loss how to act, abandoned the ship, and placed her and her cargo at the disposal of the Vice-Admiralty Court, by order of which court they were afterwards sold, the ship on the 18th

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and the greater part of the cargo on the 21st of *May*, and the proceeds lodged in the registry of the court, though there had been two surveys of the ship, upon both of which it was reported she might be repaired, and though the Plaintiff's indigo was undamaged, except as to about 21 chests. The ship was afterwards repaired by the purchaser, and proceeded on a voyage in the *August* ensuing. The Plaintiffs called another captain of great experience, who said that the expense of repairing would not have exceeded 2000*l.* or 2500*l.*; that he had advised the Defendant's captain to tranship the goods and forward them to *England* by another vessel; had offered for that purpose his own vessel, then about to sail, and had cautioned the Defendant's captain against having any thing to do with the Vice Admiralty Court, because it would only occasion him unnecessary and ruinous delay and expense. *Dallas* C. J. directed the jury to consider whether the ship could have been repaired, or whether the goods could have been transhipped and so forwarded to their destination, adding, that if they could have been so transhipped, in his opinion the captain was bound to tranship them: the jury found that the ship might have been repaired, and that the goods might have been transhipped, and gave a verdict for the Plaintiffs.

Vaughan Serjt. having obtained a rule *nisi* for a new trial, on the ground that the Defendant was excused from his contract by the perils of the seas, and that the jury had been misdirected,

Lens and *Taddy* Serjts. shewed cause against the rule. The Defendant would only have been excused by the perils of the seas, if the goods had been actually lost; but that not being the case, he was as much bound to tranship and forward them to their destination, if he could

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could not conveniently carry them himself, as a carrier by land is bound to forward goods where his waggon breaks down. The captain is agent for the owner, who is, therefore, responsible for the acts of the captain: but the captain had no authority to sell the cargo; the utmost he can do in a case of extreme necessity, is to hypothecate. Case of the *Gratitudine* (*a*), *Wilson* v. *Dickson*. (*b*) In the case of the *Gratitudine* (*c*), Lord *Stowell* says, he ought to look out for the means of accomplishing his contract if possible; that is, the safe conveyance of the property entrusted to his care in that same vehicle which he has contracted to furnish. If the captain had no power to sell, the order of the Vice Admiralty Court makes no difference in the case; for it is clear that court had no authority to issue any such order. *Reid* v. *Darby*. (*d*) The captain does not become agent for the owner of the cargo, except in cases of insurance or fiscal regulations, (*per* Sir *W. Scott* in the case of the *Mercurius*) (*e*), unless the character be forced upon him by some unavoidable necessity; no such necessity existed in the present instance, because the cargo might have been transhipped and forwarded at once.

Vaughan contrà. The captain is not bound to tranship the goods and forward them; he is only at liberty to do so if he pleases; and this is the language used by Lord *Stowell* in the case of the *Gratitudine*, p. 261. Neither is the owner bound to incur the expense of a reparation which might frustrate his whole adventure; it would be most unreasonable that he should be compelled to spend 3 or 4000*l.* in repairs, in order to earn 3 or 400*l.* freight. In the present case the repairs

(*a*) 3 *Rob. Adm. Rep.* 240.
(*b*) 2 *Stark.* 1. 2 *B. & A.* 2.
(*c*) P. 261.
(*d*) 10 *East*, 143.
(*e*) 1 *Rob. Adm. Rep.* 84.

could

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could not have been done, except at an expense that would have defeated the object of the voyage; and these ruinous repairs were rendered necessary by tempestuous weather; as far, therefore, as the ship and its owners are concerned, the voyage was terminated by the perils of the seas upon the ship's arriving at the *Mauritius*, and the Defendants are therefore discharged by the express terms of their contract; it is by these terms, by the exception of the perils of the seas, that a carrier by sea differs from a land carrier; the land carrier is, in effect, an insurer also, but the carrier by sea excludes that species of liability, by refusing to answer for the perils of the seas. The voyage being terminated by the perils of the seas, the captain becomes, by unavoidable necessity, the agent for the owner of the cargo, and in that capacity the ship owners are no longer answerable for his acts; admitting, however, that he continues the agent of the ship owners, he is only their agent for purposes within the scope of his authority; his authority from the ship owner is to convey, not to sell the cargo committed to his charge; and in no case has a principal been held liable for the tortious acts of his agent or servant.

DALLAS C. J. I certainly told the jury it was the duty of the captain, under the circumstances of this case, to tranship the Plaintiff's goods if he had the means of so doing; the jury found that he had the means, and to me it appears an extraordinary doctrine, that the owners may stop short and frustrate the intentions of the freighter; I cannot distinguish between the act of the owners and their captain in such a case; I therefore told the jury, that the owners were responsible for the act of their captain, and I see no reason for coming to an opinion different from that which I then advanced.

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PARK J. It has been urged that the Defendant's contract is limited by the bill of lading; this is true; but in the eye of the law, a ship owner is a common carrier: all the elementary books say, that masters of ships, bargemen, and lightermen, are common carriers, and chargeable on the custom of the realm; there is no distinction between them and other carriers, and all are responsible for the acts of their agents. The Defendant, therefore, is liable on his contract, unless he is exempted by some exception in it. What is the exception here? The dangers and accidents of the seas, of what kind soever; the Plaintiff's goods were not lost by the dangers of the seas, and the exception cannot be extended by implication. In the ancient law of this country, the greatest jealousy is expressed on the subject of any supposed difference between the responsibility affecting masters of ships and carriers by land; and in *Tremenheere* v. *Tresilian* (a), Lord *Hale* held, that the master of a ship could not sell, or his transfer confer any property, in cases of unyielding necessity. That principle has been qualified in modern times, but even now the master cannot sell except in a case of inevitable necessity, and that very exception confirms the general rule. Such is the rule with regard to ships, and it applies more strongly in the case of goods. The question was fully discussed in the case of the *Gratitudine*. At the time when that case was decided, except *Justin* v. *Ballam* (b), no authority could be found which would justify the captain even in hypothecating the cargo; and in *Reid* v. *Darby*, Lord *Ellenborough* expressly decides, that the Admiralty courts can give no authority for the sale of the ship. In the case of the *Fanny* and *Elmira* (c), Lord *Stowell* says, touching such a sale, "In the first place it must be shewn that there was a necessity; and

(a) 1 *Sid.* 452. (b) 1 *Salk.* 34. (c) *Edw.* 117.

then

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then it remains to be considered, whether it was such as by law would give the master a right to sell. That such a case may arise, I am not prepared to deny; suppose, for instance, a ship in a foreign country, where there is no correspondent of the owners, and no money to be had on hypothecation to put her into repair: in a case of that description, strongly put, where there was no ground for suspicion, although I do not know that such a power is given the master by the general maritime law, yet feeling its expediency, this court would strain hard to support the title of the purchaser. But then there must be the clearest proof of necessity; it must be shewn, not only that the vessel was in want of repair, but likewise that it was impossible to procure the money for that purpose." Nothing, therefore, but extreme necessity will justify the master in disposing of the cargo. There is no colour for saying, that any such necessity existed in the present instance. The captain had an opportunity of forwarding the goods; he was requested to do so, and his ship was afterwards repaired, and proceeded on her voyage.

BURROUGH J. The Lord Chief Justice laid down the law correctly at the trial, and the jury drew the proper conclusion from the facts before them; there is no reason, therefore, for granting a new trial, and the present rule must be

Discharged.

JONES and Another, surviving Executors of JAMES JONES, deceased, *v.* RACHEL JONES.

May 9.

Plaintiffs sued as executors, upon a count which alleged that the Defendant, after the death of the testator, accounted with the Plaintiffs, as executors, concerning sums of money due from the Defendant to the Plaintiffs, as executors, and that the Defendant, upon that account, being found indebted to them as executors, promised them, as executors, to pay:

Held, that it appeared on this count, the Plaintiffs might have sued in their own right; and that, therefore, upon nonsuit, they were liable to costs.

THE Plaintiffs declared, on a promissory note (made by the Defendant and another person in favour of the testator in 1808, and payable on demand,) and also for money lent, interest, money had and received, money paid, and on an account stated.

There were thirteen counts on promises made to the testator in his lifetime. The fourteenth count stated that the Defendant, being, in the lifetime of the testator, indebted to him on a promissory note, and for money lent, &c., and the money being unpaid at the death of the testator, afterwards promised the executors to pay them.

The fifteenth count alleged, that the Defendant, after the death of the testator, accounted with the Plaintiffs as executors, concerning divers other sums of money from the Defendant to the Plaintiffs, as executors as aforesaid, before that time due and then unpaid; that the Defendant was found in arrear upon that account, and indebted to the Plaintiffs as executors, and being so indebted, promised the Plaintiffs, as executors, to pay them.

The Defendant pleaded that the cause of action did not accrue within six years, upon which allegation issue was joined.

The Plaintiffs, in fact, relied on a revival of the debt, by a promise made to them after the death of the testator, and within six years; but they were nonsuited; and upon this nonsuit, the prothonotary, upon taxation, allowed the Defendant her costs; whereupon

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Peake Serjt. obtained a rule, calling upon the Defendant to shew cause why the prothonotary should not review his taxation of costs.

Lawes Serjt. shewed cause. It was formerly held, that the executor when nonsuited would be exempt from costs, if the sum which he proposed to recover would be assets in his hands; that rule, however, has been abandoned, and it is now clearly established, that the executor is only exempt where he necessarily sues as executor, and that wherever he has the power of suing in his own right, without naming himself executor, he shall pay costs if he be nonsuited, though he sue as executor, and the sum to be recovered would be assets in his hand. Thus, in an action on bond, the executor who fails shall not be liable to costs, though the breach of condition assigned be a breach in the time of the executor, because the bond is the foundation of the action, and the Plaintiff cannot sue on that, without naming himself executor. *Portman* v. *Cane.* (a) But where the action was for money had and received by the Defendant after the testator's death, to the use of the Plaintiff's wife, as executrix, the Plaintiff, having failed in the action, was held liable to costs. *Goldthwayte* v. *Petrie.* (b) So, in an action of trover, where the conversion was in the time of the executor. *Ballard* v. *Spencer* (c), *Hollis* v. *Smith.* (d) In *Cockerill* v. *Kynaston* (e) the conversion to which the evidence was directed was in the testator's time. In the present case, for the matters stated in the fifteenth count, the Plaintiffs might have sued in their own right; and *Jones* v. *Willson* (f) is the same case as the present. (*Per Curiam.* 11th *Modern Reports* is not

(a) 2 *Ld. Raym.* 1413.
(b) 5 *T.R.* 234.
(c) 7 *T.R.* 358.
(d) 10 *East,* 293.
(e) 4 *T.R.* 277.
(f) 11 *Mod.* 256.

esteemed

esteemed a book of authority.) The cause of action accruing to the Plaintiffs in right of their testator, was barred by the statute of limitations, and the action was brought on the subsequent promise, which was a new cause of action. In *Bidl* v. *Palmer* (*a*), as reported in Sir *T. Jones* and *Keble*, the account stated was with reference to a debt due to the testator, and created no new cause of action, but only ascertained the old cause, which still remained the debt of the testator.

Peake, in support of his rule. The account having been entered into by the Defendant, with reference to a debt originally due to the testator, the Plaintiffs were obliged to sue as executors, and could not have recovered had they sued in their own right. The subsequent promise did not create a new debt, but only afforded available evidence of the old. Evidence of an account made in respect of the promissory note could only be admissible under an allegation of an account with the Plaintiffs, as executors: therefore, although the Plaintiffs might, under the fifteenth count, recover on an account stated with them in their own right, yet there is nothing on the face of the count which would exclude a recovery in the right of the testator; and the Plaintiffs are not liable to costs, unless it appears, upon the face of the count, that they might have sued in their own right. In the cases relied on it has appeared on the face of the count, that the Plaintiff's naming himself executor was unnecessary; as in *Goldthwayte* v. *Petrie*, where the suit was for money had and received by the Defendant after the death of the testator, not only the promise but the cause of action appeared, on the face of the proceedings, to have accrued to the executor in his own right. So, in the cases in trover, the conversion,

(*a*) 2 *Lev.* 165. 3 *Keb.* 626. 643. *Tho. Jones*, 47.

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which was the cause of action, occurred after the death of the testator; so that it necessarily appeared, on the face of the declaration, that the Plaintiff might have sued in his own right; but where on the declaration it has appeared he must sue as executor, he has been holden excused from costs, though the immediate cause of action arose after the death of the testator, as in *Portman* v. *Cane*, *Tattersall* v. *Groote* (a), *Cooke* v. *Lucas*. (b) *Bull* v. *Palmer* is decisive of the present question. There the account stated by the Defendant, with the Plaintiff, being in respect of a debt due to his testator, it was holden he would have been nonsuited, if he had declared in his own right; and nothing appearing upon the face of the decclaration to shew that the accounting was not in respect of a debt due to the testator, or that the Plaintiff could have sued in his own right, he was holden exempt from costs. If the fifteenth count had been demurred to, or a motion were to be made in arrest of judgment, on the ground of misjoinder, the Court would say it must be presumed, that the account stated was in respect of a debt due to the testator; so that if, on this occasion, the Court should hold, that it can only comprehend an account stated with the Plaintiffs in their own right, the count must be read in different ways on different occasions.

PARK J. I am of opinion, that the taxation by the prothonotary is right. The argument for the Defendant is founded on the case of *Bull* v. *Palmer*, which was decided in the time of *Charles* the Second; though the object of the courts, of late, has been to restrain the rule which has existed in favour of executors. Still, where the cause of action and the promise are laid, as accruing in the time of the testator, executors are ex-

(a) 2 *B. & P.* 253. (b) 2 *East*, 395.

empt

empt from costs. But it was laid down, in *Hollis* v. *Smith*, which was decided in 1808, and by *Mansfield* C. J. in 1809 (*a*), " that where an executor may declare in his own right, he shall be liable for costs." In *Tattersall* v. *Groote*, Lord *Eldon*, in effect, supports the same doctrine, because that was an action of covenant; and though the breach was after the death of the testator, the Plaintiff, in order to shew a right to declare on the deed, was obliged to sue as executor. The only question here, is, whether, upon the face of the declaration, it does not appear the Plaintiffs might have sued in their own right. They say, " that after the death of the testator, the Defendant accounted with them as executors, concerning sums due from the Defendant to the Plaintiffs, as executors, and upon that account, being found indebted to the Plaintiffs, as executors, promised the Plaintiffs, as executors, to pay them." If they meant to shew, that the accounting was of sums due in the time of the testator, they ought to have said, the Defendant accounted with them, as executors, concerning sums due from the Defendant to the testator. I think it appears on this count, that the Plaintiffs might have sued in their own right, and, therefore, the present rule must be discharged.

BURROUGH J. By reference to Sir *T. Jones*'s reports, it appears, that the case of *Bull* v. *Palmer* is no authority for the position which is maintained on the part of the Defendant, because the account stated in that case appeared to be concerning a debt due to the testator. We have been pressed with the argument as to what we should hold, if the fifteenth count were demurred to on the ground of misjoinder; it will be sufficient to decide that point when it shall arise; but if it were necessary

(*a*) In *Grimstead* v. *Shirley*, 2 *Taunt.* 119.

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now, I should say that there is no misjoinder, because whatever is recovered under the count will be assets. But it does not appear on the face of the count, that the Plaintiffs were bound to sue as executors, which, if the cause of action accrued to them on a matter arising in the time of the testator, they ought to have shewn; the accounting described is clearly one on which the Plaintiffs might have sued in their own right.

Rule discharged. (a)

(a) *Dallas* C. J. was absent

1823.

In the Matter of WILLIAM HENRY ROCHFORT, May 10.

The clerk of the papers in the *Fleet* prison is entitled to a fee of 2*s*. 6*d*. on every action from which a prisoner is discharged.

WILLIAM *Henry Rochfort*, a prisoner in the *Fleet*, having obtained discharges in twelve actions under which he had been detained in custody, the warden of the *Fleet* demanded, and obtained from him, previous to his enlargement, among other fees, which were undisputed, 1*l*. 10*s*. for the clerk of the papers.

The warden of the *Fleet* having been called on, under a motion made by *Pell* Serjt., "to shew cause why he should not repay to the said *W. H. Rochfort* the sum of 1*l*. 10*s*., the same having been taken by the said warden for fees which were not legally due to him,"

Vaughan Serjt., for the warden, stated, that by a rule or order of this court, made in *Easter* and *Trinity* terms, 13 *G*. 1., 1727, it was ordered, "that on a prisoner's discharge, there is due, and ought to be paid to the clerk of the papers for every action 2*s*. 6*d*.:" that this appeared to be an ancient fee at that time, and had been demanded and paid ever since, though it did not appear in the list of fees on the table hung up in the prison under the acts of 2 *G*. 2. *c*. 22. and 32 *G*. 2. *c*. 28., that table and those acts applying only to the warden's fees, which were settled by another rule of court in 1729.

Pell Serjt. contended that, under the provisions of those acts, no fee could be taken for the discharge of any prisoner, except such as appeared on the table of fees publicly hung up, and that, therefore, the table framed under the authority of the acts must be deemed to have superseded the authority of the rule of court in 1727,

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so far as that rule related to the fees of the officers of the prison on the discharge of prisoners.

The *Court* said that this was a question of nicety, arising on the construction of the orders of the court and the acts of parliament taken together. They, therefore, commended the warden for requiring the fee, (which, as a trustee for his successors, he was bound, after a usage of more than ninety-six years, not to abandon without an order of the court,) and having stated that he obtained his appointment entirely from his known character for probity and humanity, took time to consider.

Their ultimate decision was now delivered by

PARK J. The Court upon consideration think this rule must be discharged: when the case is looked into, there is no difficulty in it. In *Easter* term 13 *G.* 1., 1727, *Eyre* C. J. and the other Judges of this court, made a rule of court regulating the fees which should be taken by the warden of the *Fleet*, and ordering also, 2*s.* 6*d.* to be paid to the clerk of the papers upon each discharge. If that rule continues in force, there is no colour for this application, for the fee in question is not taken for the warden of the *Fleet*, but for the clerk of the papers. In 1729, an act was passed, (2 *G.* 2. *c.* 22.) which was afterwards incorporated in the lords' act; it was there enacted, "that a table of fees should be settled by the justices and hung up in the prison; and that no gaoler, or keeper of any gaol or prison, should demand, take or receive, directly or indirectly, of any prisoner or prisoners for debt, any other or greater fee or fees whatsoever, for his, her, or their commitment, chamber rent, release or discharge, than what should be mentioned and allowed in such list or table of fees, so to be enrolled, registered, and hung up as aforesaid." In pursuance of this

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this act, the Judges of this court settled a table of fees which is now hung up, and which the warden has received ever since. But that statute relates only to the fees to be taken by the warden; it does not touch those which are claimed by the clerk of the papers, while the order of 1727 applies particularly to the demands by the clerk of the papers. Nor is this to be considered an indirect taking by the warden; because the report of the commissioners on the duties, salaries, and emoluments in courts of justice, expressly recognises this fee, and says, that the clerk of the papers has no other salary: the commissioners further state, that the fee was settled by a rule of court of 1727, has been invariably received since that time, and was probably an ancient fee then.

Under these circumstances we think the present rule must be discharged, though without costs, as it was natural the application should be made, the fee not appearing on the public table.

Rule discharged accordingly.

DODDINGTON v. HUDSON.

May 12.

In an action on the case by a reversioner for an injury done to his inheritance by a stranger, the tenant in possession is a competent witness to prove the injury.

TADDY Serjt. moved in this case for a new trial, which was opposed by *Peake* Serjt.

Their arguments, as well as the ground of the motion, sufficiently appear in the following judgment of the Court, which was delivered by

PARK J. This was a rule to shew cause why there should not be a new trial, as it was alleged on account of the improper reception of a witness, by the Lord Chief Baron.

A re-

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A reversioner had brought an action against the Defendant for an injury done to his inheritance: he called his tenant to prove the encroachment; the tenant was objected to by my Brother *Taddy*, as an interested witness. But the Lord Chief Baron allowed him to be examined, reserving the point. The question is, whether he was properly received? There is no doubt that the ancient rules of evidence respecting the competency of witnesses have been much narrowed; and the courts have endeavoured as much as possible to let the objection go to the credit, rather than to the competency of the witness: this was Lord *Mansfield*'s course: but long before his time, when Lord *Hardwicke* was Chief Justice of the Court of King's Bench (1736,) he said, "whenever an objection of this sort was made at *Nisi Prius* before him, he was always inclined to restrain it to the *credit* rather than to the competency of the witness," *Rex* v. *Bray*. (*a*) But the rule, which governs our decision in this case, is to be found in *Bent* v. *Baker*. (*b*) Lord *Kenyon* says, "wherever there are no positive rules of law against it, it is better to receive the evidence of the witness, making, nevertheless, such observation on the credit of the party as his situation requires." The general question on the *voir dire* amounts to this, whether the event in that cause will affect his interest. "I must acknowledge," says his Lordship, "there have been various opinions upon this subject, and it is impossible to reconcile all the cases. I think the principle to be extracted from them all is this, if the proceedings in the cause cannot be used for him, he is a competent witness, although he may entertain wishes upon the subject, for that only goes to his credit and not to his competency; as where he stands in the same situation with the party for whom he is called to give

(*a*) *Ca. Temp. Hardw.* 360.

(*b*) 3 *T. R.* 27.

evidence

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evidence — or where a father is giving evidence for his son — but this does not render him incompetent; and such circumstances are always open to observation." This case was decided after great consideration: it was originally in this court, but taken upon a bill of exceptions to the Court of King's Bench, where the opinion of Lord *Loughborough*, that the witness was not competent, was overruled, and no writ of error, though threatened, was ever brought on the judgment of *B. R.* But that case has been frequently since referred to and confirmed, as in *Jordaine* v. *Lashbrooke*. (*a*) In *Smith* v. *Prager* (*b*), Lord *Kenyon* says, they are now called upon to review their decision in *Bent* v. *Baker*; he then adopts and confirms the rule there laid down, states it more fully and quotes all his authorities: his Lordship says, "the case of *Bent* v. *Baker* laid down a clear and certain rule, by which I have ever since endeavoured to regulate my opinion in causes coming before me at *Nisi Prius*, though probably I may not have decided properly in every instance, when called upon to form an opinion on the sudden. The rule there laid down, was, that no objection should be made to the competency of a witness upon the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest." And, subsequently, in *Forrester* v. *Pigou* (*a*), the above rule was not impugned by the Court of King's Bench, after Lord *Ellenborough* had long presided there; but there the case was sent back to ascertain the fact, whether the Defendant's witness who had paid the loss, had not entered into a bargain, that if the Plaintiffs failed in the action against the then Defendant *Pigou*, he was to receive back the money he had paid? For,

(*a*) 7 *T. R.* 601. (*b*) *Ibid.* 60. (*c*) 1 *M. & S.* 9.

if

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if so, he was directly interested in procuring a verdict for the Defendant.

Thus it stands upon authority as to the general point. Now we have looked with great anxiety to see whether the Defendant could gain or lose by the event of this suit: but we are unable to discover the possibility of that fact. Neither can this verdict be given in evidence for or against him, in any action for or against him. If the Plaintiff recover a verdict, the damages are entirely to himself for the injury done to his inheritance; he is not bound to lay out a single farthing, during the tenancy, nor if the witness should bring an action for the injury done to his possession, can the Plaintiff's verdict in any way directly or indirectly be used for him. It is true, the witness may have his wishes, and his situation may have created a bias on his mind: but that circumstance existed in all the other cases: it may subject the witness to observation, it may affect his credit with the jury; but it does not, in our opinion, destroy his competency. And surely a person in the situation of this witness cannot have a stronger bias on his mind, than, where two actions are brought for the same assault against two persons, the Defendant in one cause, who may be a witness for the other Defendant, must have, in giving his testimony.

This point must often have arisen: no case has been cited, where a witness of this description has been rejected: for neither the case of *Doe dem. Foster* v. *Williams* (a), (that a tenant in an ejectment cannot be a witness for his landlord to maintain his own possession;) nor that of *Pyke* v. *Crouch* (b), (that a man cannot be a witness for another where they both claim under the same deed,) have any bearing on the point under discussion. We have reason to believe such witnesses

(a) *Cowp.* 621. (b) 1 *Ld. Raym.* 730.

have

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have been constantly admitted, and we have been informed, that in one case on the northern circuit, though we have not obtained the name of the case, such an objection was lately made, overruled, and no application made to set aside that decision.

However, in the absence of authority on the particular point, admitting it to be a novel case, we violate no rule of law, we oppose no authority; but on the contrary, by deciding that this rule ought to be discharged, we support the general principle, that where the verdict cannot be given in evidence for or against the witness, and where he can derive no benefit from the testimony he gives, whatever his wishes may be, his testimony ought not to be excluded.

Rule discharged.

MAVOR, Assignee of PYNE, a Bankrupt, v. CROOME.

May 12.

A bankrupt proposed, after an act of bankruptcy, to dispose of his lease, which was a beneficial lease; the purchaser refused to buy unless five quarters' rent due to the landlord were first paid; after negociation between the bankrupt and the landlord, who knew the bankrupt's situation, the rent was paid out of the money which the purchaser had agreed to give for the lease, there being at the time of the transaction no distress on the premises, but the landlord having a right of re-entry:

Held, that the bankrupt's assignee could not recover from the landlord the rent so paid him.

PYNE was lessee to the Defendant, of a house in *Mary-le-bone*, and at *Christmas*, 1819, owed the Defendant 87*l.* 10*s.*, for five quarters' rent. In *November*, 1819, *Pyne*, having been for more than a twelvemonth before that time, and being then in custody within the rules of the *Fleet*, proposed to sell his term in the Defendant's house, for 220*l*, to Mr. *Thompson*.

Thompson

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Thompson refused to purchase, except on the terms of the 87*l.* 10*s.*, which would be due for rent at *Christmas*, being previously discharged. A correspondence, thereupon ensued between *Pyne* and the Defendant, in which it was agreed, that *Thompson* should pay the Defendant the 87*l.* 10*s.* rent arrear, out of the 220*l.* which he was to give for the lease; and the 87*l.* 10*s.* was, accordingly, shortly afterwards, paid by *Thompson* to the Defendant, who all along knew of *Pyne*'s insolvency and incarceration. The assignment to *Thompson* was made in *November*, 1819, when one *Henry Morland* gave up the indenture of lease from Defendant to *Pyne*, being first paid a debt, for which he held the lease as a security. At the time of the assignment there were no goods in *Pyne*'s house, which had been for some time unoccupied. But the Defendant's lease to *Pyne* contained a clause of re-entry, *if the rent should be unpaid by the space of* 21 *days, next after either of the days appointed for payment*, or upon breach of any of the covenants contained in the lease.

On the 31st of *January*, 1822, a commission of bankrupt was sued out against *Pyne*, his incarceration, which had commenced in *September*, 1818, being the act of bankruptcy.

The Plaintiffs, as assignees of *Pyne*, then sued the Defendant, for the 87*l.* 10*s.*, paid to him by *Thompson*, as money had and received to the Plaintiff's use, the money having been paid after an act of bankruptcy, of which the Defendant was cognisant, and the Defendant, at the time of the receipt, being privy to the insolvency of the bankrupt.

At the trial before *Dallas* C. J., *London* sittings after last *Michaelmas* term, the foregoing facts were made out, when the jury, under the direction of his Lordship, found a verdict for the Defendant, leave being given to the Plaintiffs to move to set aside this verdict, and enter a verdict for the Plaintiffs for 87*l.* 10*s.*

Taddy

Taddy Serjt. having obtained a rule to that effect,

Lens and *Lawes* Serjts. shewed cause. The Defendant, on condition of receiving the 87*l.* 10*s.*, waived the right he had to distrain for it on any goods which an assignee might place on the premises; and without such a waiver no purchaser could be found. He also waived the right of re-entry which had accrued to him on non-payment of the rent, and which if he had asserted, *Morland*'s debt would still have been a claim on the bankrupt's estate. The estate, therefore, has been manifestly benefited by the transaction, and the Defendant has only received a compensation for the relinquishment of a right which he might have exercised to the prejudice of the bankrupt and his assignees; so that it is not necessary to contend, nor is it contended, that this was a payment protected by the provisions of 19 *G.* 2.; but it resembles the cases where a creditor, having a lien on the title deeds of a bankrupt, refuses to deliver them up, except on payment of his debt; a payment which has always been esteemed valid, as against any claim on the part of the assignees; *Stevenson* v. *Wood* (*a*) is in point for the Defendant; for though in that case there were goods on the premises which the Defendant might have immediately distrained, and in the present case there were none, yet the Defendant's right to distrain was the same in both; and it is immaterial whether the right be exercised on goods actually at hand or on goods which may come to hand at any subsequent period.

Taddy Serjt.. There being no goods on the premises at the time the Defendant received the money, he abandoned nothing from which he could have derived any advantage; and instead of distraining on goods which might be subsequently placed on the premises, he ought to have proved his debt under the commission; so that

(*a*) 5 *Esp. N. P. C.* 200.

the

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the case is at once distinguishable from *Stevenson* v. *Wood*, and differs from those in which the bankrupt or his assignees have no other means of obtaining property over which a creditor may have a lien, but by paying that creditor's debt. There being no clause of cesser in the Defendant's lease, he could not re-enter upon non-payment, unless he had made a demand with all the requisite technical formalities on the day of payment; and that not having been done, he had in fact no right of re-entry at the time he received this payment. [*Park* J. *Doe d. Scholefield* v. *Alexander* (a) decides the contrary.] The Defendant's is undoubtedly a case of great hardship, but in that respect it does not differ from any others, in which parties have been obliged to refund payments made after an act of bankruptcy; he must prove under the commission, and stand in the same situation as the other creditors, which is the less unreasonable, inasmuch as the Defendant knew all along the situation of the bankrupt.

Cur. adv. vult.

PARK J. We have considered this case, and are of opinion the rule ought to be discharged. The case is peculiar in all its circumstances. A party who has a beneficial lease in a house, goes to prison and becomes a bankrupt. He has an opportunity of disposing of this lease beneficially, but five quarters' rent being in arrear, the purchaser refuses to take the lease unless the rent is paid. The bankrupt communicates with his landlord, and is allowed to obtain 220*l.* for the lease, on paying out of that sum the rent due, and money which had been lent by a mortgagee; this takes place two years before the assignees commence the present suit; but it is contended, that as there were no goods which the De-

(a) 2 *M. & S.* 525.

fendant

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fendant could distrain, and as he knew the situation of the bankrupt, he cannot retain the rent he has thus received. We do not say this is a payment under 19 *G.* 2.; it does not come under the provisions of that statute; but the case of *Stevenson* v. *Wood* was relied on for the Defendant, and on that case we proceed. That was an action for money had and received, to recover a sum which had been paid to the landlord for rent after an act of bankruptcy. The ground of law taken for the Defendant was, that the landlord had a right to distrain for rent arrear, and the goods of the bankrupt were subject to the distress, notwithstanding the act of bankruptcy; that having that right he had a power to waive it, and to accept the rent in lieu of his right to distrain. Lord *Ellenborough* assented to the law so laid down: he said, "the landlord has by law a right of distress; if he thinks fit to waive that right and accept of the rent, he should not be placed in a worse situation than if he had made an actual distress; it would be a fraud on his legal rights to hold otherwise." In the present case, although there were no goods on the premises, the landlord had a right to distrain on any which might be subsequently placed there; he had also a right of entry, and might have brought an ejectment; that right he has waived by the receipt of the rent, and the assignees have derived a benefit from the transaction, because the bankrupt's estate was subject to the rent and the mortgage, both of which are now discharged, but must have remained as proveable debts, unless the Defendant had been induced to accede to the transfer of the lease. Under all the circumstances, therefore, the rule must be

Discharged.

1823.

May 12.

FROST *v.* BENGOUGH.

In an action on a promissory note, the Defendant having pleaded the statute of limitations, the Plaintiff gave in evidence, as proof of an acknowledgment within six years, the following letter from the Defendant to the Plaintiff: "Business calls me to *Liverpool.* Should I be fortunate in my adventures, you may depend on seeing me in *Bristol;* otherwise, I must arrange matters with you as circumstances will permit." The Defendant did not shew that there were any other matters besides the promissory note to which the letter could refer:

Held, that it was properly left to the jury to decide whether this letter referred to the matter of the promissory note, and was a sufficient acknowledgement to take the case out of the statute.

THIS was an action on a promissory note for 30*l.*, dated 15th of *May*, 1815; the Defendant pleaded the statute of limitations; and the Plaintiff, at the trial before *Dallas* C. J., *London* sittings after *Michaelmas* term last, gave in evidence the following letter from the Defendant to the Plaintiff, as proof of a subsequent acknowledgment:

"Sir, — Business calls me on the sudden to *Liverpool.* Should I be fortunate in my adventures, you may depend on seeing me in *Bristol* in less than three weeks; otherwise, I must arrange matters with you as circumstances will permit. I shall leave town to-morrow night.

"*H. Bengough.*

"*London*, 24th *September*, 1817."

Dallas C. J. told the jury he was not aware of any letter so general as the one in question having been considered sufficient to take a case out of the statute, but that no evidence had been offered of any other dealings between the parties; and the jury were to decide, under those circumstances, whether the letter applied to the transaction in dispute.

The jury found a verdict for the Plaintiff; and upon being asked, said, they considered that the letter given in evidence referred to the promissory note.

Vaughan Serjt. moved for a new trial, on the ground that this letter contained no acknowledgment of the

debt

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debt, and that it ought not to have been left to the jury to put a construction on it.

Taddy Serjt. shewed cause. The letter contained a sufficient acknowledgment, if there were no other dealings between the parties; no evidence was offered of any such dealings, and all that was left to the jury was, not to put a construction on the letter, but to say whether there were any other transactions to which it could apply. In *Lloyd* v. *Maund* (a), it was holden that a letter, the terms of which were ambiguous, ought to be left to the jury.

Vaughan. In *Lloyd* v. *Maund* the letter contained much more than in the present case. In *Beale* v. *Nind* (b), *Bayley* J. says, "the onus of taking a case out of the statute of limitations is upon the Plaintiff;" so that he ought to have shewn that there were no other dealings to which the letter could refer. But even if there were none such, the letter is insufficient to charge the Defendant, since it contains no acknowledgment whatever of any debt, and according to Lord *Ellenborough* a distinct acknowledgment is necessary. *Rowcroft* v. *Lomas.* (c)

PARK J. I think there ought to be no new trial in this case. Within our memory, the statute of limitations has been too much frittered away; because, even where a party denied that he owed any thing, (*Bryan* v. *Horseman*) (d), "it being more than six years since he contracted," Lord *Ellenborough* held him liable, and in this court there have been several cases in which the evidence of admission has been but slight: but in this case, a paper is produced, which, though ambiguous, is sufficient to shift on the Defendant the *onus* which was

(a) 2 *T. R.* 762.
(b) 4 *B. & A.* 571.
(c) 4 *M. & S.* 458.
(d) 4 *East*, 599.

at

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at first on the plaintiff, and the Defendant might have shewn, if he could, that there were other matters to which the letter applied. In *Beale* v. *Nind* it was left to the jury to consider, whether there was only one account to which the Defendant's supposed admission could refer. Was it not fit, then, that this letter should go to the jury? *Lloyd* v. *Maund* is an important case to that point. The letter containing the acknowledgment was in that case, as in the present, ambiguous; but *Ashurst* J. says, "though this letter is written in ambiguous terms, there are some parts of it from which the jury might perhaps have inferred an acknowledgment of the debt; and I think the jury should have put their construction upon it." That case, therefore, is a warrant for the propriety of what has been done in the present. Whether or no the jury have drawn the right conclusion, it is not necessary for us to decide; if it were, I should concur in that conclusion.

BURROUGH J. There is nothing to which the letter appears to relate, but a prior demand. "Should I be fortunate in my adventures, you may depend on seeing me in *Bristol*;" — Why? To bring down what his fortune produced. — "Otherwise I must arrange matters with you as circumstances will permit." I think the jury did right in referring this to an existing demand. The Defendant might, perhaps, have shewn that there were other demands to which the letter applied, but he omitted to do so; and I think it was properly left to the jury to decide whether it applied to the Plaintiff's demand or no.

Rule discharged. (*a*)

(*a*) *Dallas* C. J. was absent, being unwell.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Trinity Term (a),

In the Fourth Year of the Reign of GEORGE IV.

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MACKINTOSH v. BLYTH.

June 4.

An arbitrator to whom it was referred to certify what verdict should be entered up, certified for the Plaintiff, and orally communicated to the parties that each should pay his own costs of the reference; which was acceded to by them. The cause having been referred back to the arbitrator, he certified in the same way a second time, but omitted to give any direction as to the costs of the second reference: Held, that the Plaintiff was entitled to those costs.

WHEN this cause came on for trial, it was referred to a barrister to ascertain what verdict ought to be given, and his certificate was to be entered up as the verdict of a jury.

The arbitrator certified that a verdict should be entered up for the Plaintiff for 62*l.* 14*s.*; and orally communicated to the parties, that each should pay his own costs of the reference, which was acceded to by them.

Upon a motion to set aside the arbitrator's certificate, the cause was referred back to him, when he a second

(*a*) *Richardson* J. was absent during this term, being confined to his house by ill health.

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time certified to the same effect; but at the time of certifying made no communication as to the costs of the second reference, thinking he had no authority for that purpose. These costs were claimed by the Plaintiff before the prothonotary; but disallowed by him. Upon which,

Lens Serjt. obtained a rule *nisi* for the prothonotary to review his taxation, and allow these costs.

Taddy Serjt. shewed cause, contending that the prothonotary ought not to allow the costs of the second reference, unless authorized by the arbitrator, the reference to him being in effect a reference of all the matters in difference in the cause; that the arbitrator having given no directions, it must be inferred the costs of the second reference were to be discharged in the same way as the costs of the first.

Sed per Curiam. The inference is the other way; in the absence of any specific direction the costs must follow the verdict.

Rule absolute.

June 4.

LOWE *v.* LOWE.

In trover, the Court would not stay proceedings on an affidavit from the Defendant that the cause of action did not amount to 40*s*.

UPON an affidavit of the Defendant, that the demand in this action did not amount to 40*s*.; that the Defendant was applied to by Plaintiff's attorney to deliver two loads of potatoes claimed by Plaintiff; that the Plaintiff never made any other demand; that the average price of potatoes in the Defendant's neighbourhood at the time of the Plaintiff's demand and of the Defendant's making the affidavit was 6*s*. a load; that the Plaintiff had filed a declaration against the Defendant in

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LOWE.

in trover for potatoes, and never had any other claim against the Defendant,

Taddy Serjt. obtained a rule *nisi* to stay the proceedings in this cause, the Plaintiff's cause of action not amounting to 40*s.* He cited *Kennard* v. *Jones* (*a*), and *Wellington* v. *Arters* (*b*), to shew that the application was not too late, and that it was not necessary to such an application that the debt should appear on record to be under 40*s.* Upon a question being put by the Court, whether there was any instance of the county court holding plea in trover, he referred to 2 *Inst.* 311., where Lord *Coke* says, that county courts have jurisdiction in all torts not *vi et armis*; and argued that 6 *Edw.* 1. *c.* 8. seemed directed particularly to torts, allowing sheriffs to hold in their counties pleas of trespass, which originally included trespass on the case.

Onslow Serjt., who shewed cause, contended that the county courts could not hold pleas in trover, the amount of the damages to be recovered being uncertain, and the action being frequently resorted to for trying questions of the highest pecuniary amount. The passage in 2 *Inst.* seemed, therefore, to have originated in mistake.

Taddy replied, that the Defendant's affidavit not having been traversed, it must be taken here, as it was in *Kennard* v. *Jones*, that the Plaintiff's demand did not amount to 40*s.*

Sed per Curiam. In *Kennard* v. *Jones*, it appeared that the cause of action was a debt; here, what the amount may be is altogether matter of calculation. The rule, therefore, must be

Discharged.

(*a*) 4 *T.R.* 495. (*b*) 5 *T.R.* 64.

1823.

June 4.

In the Matter of Isaacson, Clarke, and Brookes.

1. The prothonotary's report is not conclusive against parties who have been put to answer interrogatories before him, but they may except to the report on any material point.

2. Where, after making his report against the parties, the prothonotary was directed to inspect an account book belonging to one of them, which tended to support the answers given by the parties, but had been accidentally omitted in the first instance, the prosecutor was not allowed on his own application to produce before the prothonotary the clerk who had made the entries in the book.

3. The court will not receive affidavits that a party is too poor to take office copies of interrogatories filed against him.

IN *Trinity* term, 1822, *Vaughan* Serjt., upon affidavits alleging misconduct in the three persons above named, had obtained a rule calling on *Isaacson* and *Clarke* to shew cause why they should not be struck off the roll of attornies; and upon *Brookes* to shew cause why he should not be committed to the custody of the warden of the *Fleet*, for that he, not being an attorney, had practised as such in the names of *Isaacson* and *Clarke*.

Cause was shewn against the rule by *Pell* Serjt., upon long affidavits, which the Court deemed unsatisfactory, and ordered the parties to be attached, and give bail to answer interrogatories before the prothonotary.

In *Hilary* term last the prothonotary reported the parties in contempt, the interrogatories not having been sufficiently answered.

Considerable discussion then arose as to the course to be pursued; the prosecutors contending, that upon the parties being reported in contempt, his rule ought at once to be made absolute. *Pell*, on the other side, claiming to be heard again, on the ground that the Court could not give judgment or apportion punishment on the report of the prothonotary till that report had been sifted, and till it appeared in what respect the prothonotary had deemed the answers unsatisfactory; that if the prothonotary's report might be reviewed in matter of costs, it was but reasonable there should

be

1823.

In the Matter of ISAACSON.

be an opportunity of reviewing it in a case like the present.

As to which, the Court observed, that here the parties had been already fully heard upon their affidavits, which was not the case with respect to costs. The Court, however, said they would inquire what the practice had been; but they refused to receive an affidavit from two of the parties, that they were too poor to take office copies of the interrogatories.

In *Easter* term last, after allowing *Pell*, as matter of indulgence, to inspect the prothonotary's copy of the interrogatories, (upon which it appeared by the prothonotary's marks what answers he deemed satisfactory, and what not,) the Court said,

They were not bound to consider the prothonotary's report as conclusive; but would hear *Pell*, if he proposed to shew that answers as to any material point which the prothonotary had deemed unsatisfactory, were in substance satisfactory answers.

Pell was accordingly heard at considerable length in support of several such answers.

It turned out ultimately, that by some accident, an account-book of *Brookes*'s, material in support of several of his answers, had never been seen by the prothonotary, though it had been deposited with another officer of the court; and, in order to the inspection of this book, the case was again adjourned.

Vaughan, on the part of the prosecutors, now applied that a clerk, by whom the entries had been made in this book, should be examined by the prothonotary.

Sed per Curiam. The prothonotary not having declared himself dissatisfied, or required any explanation of items in the book, the prosecutors cannot be allowed to introduce oral testimony concerning it.

1823.

June 5.

Williamson v. Sir George Goold.

Where the surety under an annuity deed obtained an order to set aside an execution under which he was in custody for arrears of the annuity, upon entering into an account and paying the balance which should be found due under the provisions of the deed, and the principal afterwards succeeded in setting aside the deed itself, the Court refused to discharge the surety until he had entered into an account, or paid money into court to cover what might ultimately be found due.

THE Defendant having been taken in execution under a judgment which he had given to secure the payment of an annuity granted by his brother, *Henry Michael Goold*, (in respect of which annuity certain sums had been received by the Plaintiff,) obtained in *Hilary* term last an order for setting aside this execution, upon entering into an account and paying the Plaintiff the balance that should be found due (*a*) under the provisions of the annuity deed.

In *Easter* term *Henry Michael Goold*, upon the ground of a retainer of part of the consideration money, succeeded in setting aside the deed itself, and a judgment which he had likewise given to secure the payment of the annuity, upon paying what should be found due for principal and interest, at 5 *per cent.* (*b*) Under these circumstances,

Lens Serjt., on a former day, obtained a rule *nisi* for discharging the Defendant out of execution, although he had not accounted or paid any money into court under the former rule.

Vaughan Serjt. was to have shewn cause; but the Court called upon *Lens*, with whom was *Cross* Serjt., to support the rule. They urged that the first rule was made absolute, on the presumption that the annuity deed was valid; but the Court having since that time decided that it was void, there was nothing to support the judgment and execution under which the Defendant was in custody; and that where a deed is set aside as against the grantor, the grantee cannot recover the

(*a*) See *Ante*, 171.

(*b*) See *Ante*, 234.

con-

consideration money from the surety. *Straton* v. *Rastal.* (a)

1823.
WILLIAMSON
v.
GOOLD.

But the former rule being still in force, no motion having been made to rescind it, and the Defendant having neither accounted, nor paid money into court subject to an account to be taken on the deed, the Court thought they could not, consistently with the law or justice of the case, accede to the Defendant's application; and they, therefore,

Discharged the Rule.

(a) 2 *T. R.* 366.

OTHIR *v.* CALVERT.

June 5.

Where the costs in the cause are adjudged to the Defendant, and to the Plaintiff costs on the issues found for him, the costs of the issues, except in replevin, include only the costs of pleadings.

THIS was an action of trespass *quare clausum fregit.* The declaration consisted of two counts, to which the general issue was pleaded, and issue joined thereon, and ten special pleas justifying the trespass under a right of way. The Plaintiff traversed the right of way as set forth in these pleas and new-assigned: the Defendant joined issue on the traverses, and pleaded not guilty to the new assignment; on which issue was joined. A verdict was found for the Plaintiff, without damages, on the general issue; the issues on the two first pleas were found for the Defendant, and the remaining issues, except two, (as to which the jury were discharged,) were found for the Plaintiff.

In taxing the costs, the prothonotary had allowed the Defendant general costs in the cause; and the Plaintiff the costs of the pleadings on the issues found for him.

Pell Serjt. in the last term obtained a rule *nisi* for the prothonotary to review his taxation, contending that the

 Plaintiff

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OTHIR
v.
CALVERT.

Plaintiff was entitled to the costs of the issues found for him; and that the costs of the issues included the costs of trial occasioned by those issues, as well the costs of the pleadings on them; that considerable expense might be incurred by the Plaintiff in preparing to disprove the issues found for him, in which case it was but reasonable he should be indemnified for the charges occasioned by the Defendant's false pleading (*a*), the statute of 4 *Anne*, *c*. 16. *s*. 5. giving him costs at the discretion of the Court, unless where in replevin a certificate was given that there was probable cause for such pleading; but no such certificate existed in this case.

Mr. Prothonotary *Watlington* stated, that except in replevin, where both parties were actors, the costs of the issues covered only the pleadings on those issues.

Pell said he had cases to adduce, but upon enquiry it was admitted that those cases were all in replevin.

Mr. Prothonotary *Ray* expressing an opinion different from that of Mr. Prothonotary *Watlington*, the Court took time to enquire into the practice, stating that they should have had no doubt, but for what had fallen from Mr. Prothonotary *Ray*. And now,

PARK J. said he had spoken on the subject to several of the Judges, who were all most clearly of opinion, that in this case the costs of the issues included only the costs of the pleadings on those issues. That the point had been fully considered in *Benett* v. *Coster* (*b*), which was decided on the authority of *Vivian* v. *Blake* (*c*); and it was there holden, that where a plea which goes to the whole of the cause of action is found for the Defendant, the costs of the cause go to the Defendant, and the

(*a*) *Per Buller* J. in *Duberley* v. *Page*, 2 *T.R.* 391.

(*b*) 1 *B.* & *B.* 465.

(*c*) 11 *East*, 263.

costs

costs of the issues found for the Plaintiff go to the Plaintiff; but that by the costs of the issues, was meant the costs of pleadings only.

1823.
OTHIR v. CALVERT.

Rule discharged.

BLACKBOURN, Demandant; BROWN and Wife, Deforciants.

June 7.

The clerk of the warrants may refuse to file a warrant or pass a fine till the attorney employed by the parties has paid his termage fees.

THE clerk of the warrants, enrolments, and estreats of this court, having refused to file the warrant of attorney in the above fine, or to pass the fine, on the ground that 3*l.* was due for termage fees from the attorney concerned for the parties,

Pell Serjt. obtained a rule calling on him to shew cause why he should not file the warrant of attorney in the above fine, and mark the writ of covenant with the usual stamp of office; and why he should not pay the costs of the application.

The clerk of the warrants, &c., by *Lens* Serjt., who shewed cause for him, stated,

That the attorney concerned in levying the fine was admitted in 1796, and paid his termage fees till 1797, since which time he had paid none:

That it was a frequent practice for agents to introduce their own names in warrants, with a view to conceal the names of the attorney's immediately concerned, and skreen them from the payment of their arrears of termage; and that in many instances the clerk of the warrants had been unsuccessful in his endeavours to ascertain the name of the principal, though in the present case it had been readily admitted.

He then stated, that it had been the ancient and invariable practice of the office, when termage fees were in arrear from any attorney, to refuse to file a war-

rant

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BLACKBOURN, Demandant.

rant for him till they were paid: that this practice was recognised in a document preserved in the office, and purporting to have been the answer given in 1733 by Mr. *Eyre* to certain complaints made to the then commissioners appointed to enquire into the fees of courts of justice, from which the following is an extract:

"Complaint. This office insists upon 8*d.* every term from all attornies, or else their clients' business is stopped: till about twenty-five years ago, it was but 4*d.*

"Answer. One 4*d.* has been paid by the attorneys to the clerk for many years; and it is reported, in the 15th King *Charles* the First, to the then commissioners, to have been paid in the 11th of *Eliz.*: and the clerk has paid an immemorial composition of 11*l.* 1*s.* 4*d.* every term, to the three puisne judges, in lieu of this money collected; the other 4*d.* is collected by the order of court in *Easter* term the 10th of King *William*, 1698, for the use of the four criers of the court, and is paid to them every term. This order directs, that the fee of 4*d.* shall be demanded from the attorneys every term, at the time of filing their warrants, or signing their attachment, &c."

He also referred to the following rule of court:

"*Easter* term, 31st year of King *George* the Second. Whereas by the antient custom and several rules of this court, every attorney ought to pay to the clerk of the warrants, or his deputy, his termage fees (being 8*d.* a term), for the use of the said clerk of the warrants and the criers of this court, at the end of *Trinity* term, or before the first day of *Michaelmas* term, in every year: and whereas complaints have been made to us, by the said clerk of the warrants and criers, that of late such payments have been greatly neglected; and that several attorneys who are in arrear for their termage, in order to avoid the payment thereof, have practised with names of other attorneys who are not in arrear, but have duly paid their termage; and that there is now a very considerable

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BLACKBOURN, Demandant.

siderable sum of money due from the attorneys for such termage: for remedy thereof, and that the said clerk of the warrants and criers may not be deprived of their just and legal fees, it is ordered, that every attorney of this court shall pay and discharge all his arrears of termage to the said clerk of the warrants, or his deputy, before the first day of *Michaelmas* term next; and afterwards shall pay his said termage to the said clerk of the warrants, or his deputy, before the first day of *Michaelmas* term, in every subsequent year."

Pell, in support of his rule, contended, that the practice of the court could not justify the custom complained of, unless supported by some law or order of court; and that the order referred to contained no authority for stopping the clients' business, to enforce the payment of the arrearages of these fees. He expatiated upon the hardship of making the clients thus suffer, and of suspending all their business for a slight omission on the part of the attorney, and urged that there was the less reason for this, as the officer had other remedies to enforce the payment of the fees.

DALLAS C. J. The fee in question is a legal fee, and at some time or other the officer is entitled to recover it. The question now is, whether he is entitled to recover the arrearages in the manner pointed out; and it appears from the statement made by the clerk of the warrants, that the practice is founded on law, usage, and the orders of the court. Attornies, it seems, had formerly been in the habit of practising in the names of others, in order to avoid the payment of these arrears, and the Court then made an order, that the arrears should be paid, thereby admitting the legality of the claim. The conduct of the officer has been conformable to the general usage; for the document of 1733 refers

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fers to it as existing in the time of *William* the Third. If the attorney were to refuse to pay his arrears, pursuant to the order of 31 *G.* 2., the Court would not allow him to practise; and in effect the means resorted to to compel payment of these fees operates in the same manner, and is justified by the order of court.

PARK J. It appears that these fees have been collected from the time of Queen *Elizabeth* downwards; and from the recital in the order of court of *G.* 2., it looks as if the mode at present adopted for enforcing the payment of arrears had been all that time in practice; a practice for which the difficulty of collecting such small sums from attornies, at a distance, seems to afford a sufficient reason. Undoubtedly some inconvenience may be occasioned to the client thereby; but if he is likely to be injured, he may dismiss his attorney. A practice of the same kind exists in Chancery, where a solicitor cannot file a bill till his terminal fees have been paid.

BURROUGH J. The practice arises out of the necessity of the thing; there would be no other way of getting the fees, except at an expense which would exceed the value of them. It must, therefore, be understood that the attorneys are to pay these fees before they can carry on the business of their clients. Till the passing of a late act of parliament criminals became liable to pay fees on their acquittal, and were always detained till they discharged them; so that there is nothing extraordinary in the practice now complained of. That practice is confirmed by ancient usage and the orders of the court, and therefore the rule which has been obtained must be

Discharged.

THOMAS v. HANSCOMBE.

June 9.

In a declaration on a bill of exchange, the Court refused to strike out as unnecessary a count for interest, though, besides counts on the bill, the declaration contained the usual money counts.

IN an action on a bill of exchange, *Vaughan* Serjt. moved to strike out as unnecessary, a count for interest, which the declaration contained, besides counts on the bill, money counts, and a count upon an account stated. The Plaintiff, he urged, would be entitled to interest on a bill of exchange, without any such count. But

BURROUGH J. said, Lord *Kenyon* had declared, that applications of this kind were often more vexatious than the matter complained of; and the Court

Refused the rule.

BRIX v. BRAHAM.

June 10.

A bankrupt having promised, after his bankruptcy, and before certificate, to pay a debt due before the bankruptcy, indorsed to the Plaintiff two promissory notes for that purpose: Held, that his certificate was no bar to an action on these notes.

ASSUMPSIT for goods sold and delivered, and on two bills of exchange, amounting to 54*l*., indorsed by the Defendant to the Plaintiff. The Defendant pleaded in bar his bankruptcy and certificate.

At the *Middlesex* sittings after *Hilary* term last, it appeared that the goods, to the amount of upwards of 80*l*., were sold to the Defendant in 1812; that in 1815 a commission of bankrupt was sued out against him, under which the Plaintiff did not prove his debt; but that the Defendant subsequently promising payment, indorsed to the Plaintiff the bills in question, which became due in *March*, 1819. The Defendant obtained his certificate in *July*, 1820. Upon these facts a nonsuit was directed, with liberty for the Plaintiff to move to set it aside, and enter a verdict for 54*l*.

Vaughan

1823.

Brix v. Braham.

Vaughan Serjt. having obtained a rule *nisi* to that effect,

Cross Serjt. shewed cause. This case is distinguishable from *Trueman* v. *Fenton* (a), and from *Birch* v. *Sharland* (b), because in each of those cases there was a new consideration for the bankrupt's promise; here there was none such. In *Trueman* v. *Fenton*, where the bankrupt accepted a bill of exchange for a debt due before his bankruptcy, the consideration for his acceptance was the destruction of two other bills due before the bankruptcy; and in *Birch* v. *Sharland*, where the bankrupt was in execution, and gave a bond and warrant of attorney to obtain his liberty, the court expressly held, that this was a new nebt arising upon a new consideration, and that the old debt was thereby extinguished. In the present case, there was no new debt or consideration; and the old one being due before the bankruptcy was provable under the commission, and extinguished by the certificate. The Defendant's promise, therefore, was without consideration, and the action upon it cannot be sustained.

But the Court were clearly of opinion, that the debt due before the bankruptcy was a good consideration for the bankrupt's promise; that it was not barred by the certificate; and would have been available, even if made after the certificate had been obtained.

Rule absolute.

(a) *Cowp.* 544. (b) 1 *T. R.* 715.

THOMPSON *v.* MASHITER.

June 10.

Goods landed at a wharf, and deposited by a factor to whom they were consigned in a warehouse on the wharf till an opportunity for sale should present itself, are not distrainable for rent due in respect of the wharf and warehouse.

IN 1817, the Plaintiff consigned eleven tons and a half of whalebone to *Stephen Cleasby*, of *London*, broker, as his factor or agent, for sale. This whalebone was landed at *Ramsay*'s wharf, a public waterside wharf, and were afterwards placed in *Ramsay*'s warehouse over the wharf, for safe custody, at a weekly rent, till an opportunity should offer for selling it. In 1818 the whalebone was taken from the management of *Cleasby*, and placed by the Plaintiff under the management of Messrs. *Devereux* and *Lambert* for sale, as the brokers and factors of the Plaintiff; and the whalebone was in consequence transferred from the name of *Cleasby* to the name of *Devereux* and *Lambert*, by the wharfinger.

In 1818 *Ramsay* the wharfinger became insolvent, and was at that time indebted to the Defendants in the sum of 200*l.* for rent in arrear, in respect of the wharf and warehouse. The Defendants then caused a distress to be made on *Ramsay*'s wharf and warehouse, and among other goods seized the Plaintiff's whalebone.

The Plaintiff sued in trover for the value of the whalebone; and at the trial before *Park* J., *London* sittings after *Hilary* term last, obtained a verdict for the amount.

Lawes Serjt. took a rule *nisi* to set aside this verdict and enter a nonsuit.

Vaughan and *Taddy* Serjts. shewed cause. Whether the Plaintiff's goods be deemed to have been in the possession of the factor or of the wharfinger, they are equally protected from distress; and this for the benefit

of

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THOMPSON v. MASHITER.

of trade. As to the factor, the point has been determined by the case of *Gilman* v. *Elton* (a); and the case of the wharfinger is expressly mentioned in argument, in *Francis* v. *Wyatt* (b), and not denied by the court. Whether the wharf be private or public the goods are equally protected; on the same principle as wool at a neighbour's beam (*Rede* v. *Burley*) (c), a horse in a hostry, or sacks of corn in a mill or market. (d) The case also falls within the rule laid down in *Gisbourn* v. *Hurst* (e), that goods are exempted which are delivered to a man to be managed in the way of his trade; for the factor had the management of these goods for the purpose of sale, and the wharfinger or warehouseman to keep them dry and in good order.

Lawes, in support of his rule. The case of *Gilman* v. *Elton* is distinguishable from the present, in the material circumstance, that there the goods were on the premises of the factor himself; but though the case of a wharfinger has been mentioned in argument, there is no decision in which it has been held that goods on a wharf or warehouse are exempted from distress. In almost all the exemptions which have been permitted for the benefit of trade, the goods have been deposited with the bailee to be managed or wrought on; as clothes left with a tailor to be made up, or a horse placed with a blacksmith for the purpose of being shod: or the place in which they have been left has been so public, that the landlord could never give his tenant credit on the strength of any property he might see on the premises; as in the case of goods at a fair, or horses at an inn. But the wharfinger has nothing to do with the management of the goods, and his warehouse at least is a private edifice.

(a) 3 *B. & B.* 75.
(b) 3 *Burr.* 1503.
(c) *Cro. Eliz.* 596.
(d) *Co. Litt.* 47. a.
(e) 1 *Salk.* 250.

DALLAS

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THOMPSON
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DALLAS C. J. I think, that in this case the Plaintiff's goods were not liable to be distrained: it has not been argued, that they would have been liable if they had been sent immediately to the wharfinger and had remained in his hands; we may therefore assume, that for public convenience and the benefit of trade, goods so deposited would not have been liable.

If it were necessary we might consider these goods still to have been in the possession of the factor for a temporary purpose, when they were deposited in the warehouse, and that it makes no difference whether the warehouse be in the factor's occupation or hired for the purpose of the deposit: but the factor is agent for the owner of the goods, and as such, deposits them in *Ramsay*'s warehouse, so that the case is the same as if the owner had sent them immediately to *Ramsay*'s, where, on the broad principle of public convenience, I think they were not liable to distress.

PARK J. The cases were all considered in *Gilman* v. *Elton*; and the general principle laid down in that case is applicable to the present. The principle there laid down was, that certain exemptions of goods from distress were permitted, not on account of the character of the individual in whose hands the goods were deposited, but for the benefit of trade. On that general ground we now decide, and not on the ground that *Ramsay* was the servant or stood in the place of the factor. The instances put by Lord *Coke* are merely illustrative, but they apply in principle, though none of them, perhaps, in terms.

The judgment of Lord *Holt*, and the facts of the case in *Gisbourn* v. *Hirst*, apply closely to the present. He there lays it down, "that goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed, in the way of his trade or employ,

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THOMPSON
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are for that time under a legal protection, and privileged from distress for rent;" and even with respect to a private undertaking, "that any man undertaking for hire to carry the goods of all persons indifferently, is, as to this privilege, a common carrier, for the law has given the privilege in respect of the trader, and not in respect of the carrier;" and he refers to *Rede* v. *Burley*, where wool at a private beam was held to be not liable to distress. Therefore, keeping to the broad and general principle of convenience and benefit to trade and commerce, I think these goods ought not to have been distrained.

BURROUGH J. These goods were brought to the wharf in the course of trade, and ought therefore to be protected.

Rule discharged.

DALLAS C. J. added, that the exemption for goods on a wharf, though only asserted in argument in *Francis* v. *Wyatt*, was not dissented from by the Court or adverse counsel.

1823.

GORTON *v.* CHAMPNEYS.

June 17.

COVENTRY *v.* CHAMPNEYS.

A person employed by the grantor of an annuity to raise money, and by the grantee to pay the consideration money to the grantor, having at the time of the payment of the money received back some part of it for a debt alleged to be due from the grantor to himself, the Court, on motion, set aside the annuity on the grantor's paying principal and interest at 5 *per cent.*, though the grantee never received any of the money so returned, and was ignorant of that part of the transaction.

LAWES Serjt. had obtained in *Easter* term, 1822, a rule *nisi* for staying proceedings upon judgments given by the Defendant to the Plaintiffs as securities for the payment of an annuity granted by him, and for delivering up to be cancelled the deeds securing the annuity, upon the ground of a retainer of part of the consideration-money, and of a defect in the memorial of the annuity, on which latter objection the Court gave no opinion.

The following statement was made in the various affidavits produced on the occasion.

The Defendant swore, that having previously employed Messrs. *Howard* and *Gibbs* to raise money for him by way of annuity, he, in 1818, applied to them for more, when they recommended him to pay off his former annuities and raise sufficient for his other occasions; and that the Star Life Assurance Company, of which they were managers and directors, would advance him any sum by way of annuity at 12*l. per. cent.*, provided Defendant would pay Messrs. *Howard* and *Gibbs* a commission of 9*l. per cent.* for their procuration of the money and the expence of preparing deeds. That the Star Life Assurance Company having become first grantees of an annuity from the Defendant of 2400*l.*, and *Frederick St. John*, second grantee, the Plaintiffs being two of the proprietors of the Star Life Assurance Company, and intimately connected with *Howard* and *Gibbs*, who acted as their agents, became third and fourth grantees of an annuity of 744*l.*; but the consideration-money was

 not

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not paid to the Defendant, but was received by *Howard* and *Gibbs*, who deducted and retained thereout their commission at the rate of 9*l.* *per cent.*, and placed the remainder of the consideration-money to the credit of the Defendant.

The Plaintiff, *Coventry*, swore that having in the hands of *Howard* and *Gibbs* a balance of 1200*l.*, he was applied to by *H.* and *G.* to invest it in purchasing part of an annuity of 744*l.* to be granted by the Defendant for a sum of 6200*l.*, and that he authorised them so to dispose of it; that his share of the annuity was 144*l.*, and that he actually advanced 1200*l.* part of the consideration; that he lived in the town of *Bedford*, and had never been connected with *Howard* and *Gibbs* in money matters, except as before mentioned, and matters of a like nature; that he was not a proprietor of the Star Life Assurance Company, otherwise than as being possessed of four shares of 50*l.* each out of 2000 similar shares; that he never directly or indirectly interfered in the business of the company; that he never knew of any commission of 9*l.* *per cent.*, or any other commission being deducted or retained by *H.* and *G.*, and that if such was the case, it was without his privity or consent.

The Plaintiff, *Gorton*, being dead, his nephew and executor swore, that he never knew, nor from inspection of the testator's books or papers could he discover that the testator was by any means whatever party or privy to, or ever in any way directly or indirectly participated in charges for commission, or other charges made by *Howard* and *Gibbs* against the Defendant on account of 5000*l.* the consideration for testator's share of the annuity of 744*l.*, or that he was ever privy to any retainer, deduction, or returning of any of the consideration-money, or to any agreement between Defendant and *Gibbs* for that purpose, or that he ever knew

knew of or was privy to the settlement of account between *Gibbs* and the Defendant, stated in *Gibbs*'s affidavit.

He added, that the annuity had been paid from *June* 1818 to *December* 1819, and he produced in court for the inspection of the Judges an account book of the testator's, particularly referring to the page which contained the account of this transaction where a balance was struck by *Howard* and *Gibbs*; and where, on the debtor-side, among other items concerning annuity payments, *H.* and *G.* debited the Plaintiff with his full share of the consideration-money of this annuity.

Gibbs swore, that in 1818 the Defendant, by *Robert Burton* his agent, applied to *Howard* and *Gibbs* to raise money for him by way of annuity; and that the Defendant signed an agreement to pay an annuity of 3960*l.*, for an advance of 33,000*l.*

That the Star Life Assurance Company advanced 20,000*l.* for an annuity of 2400*l.* That 14,000*l.* more, which was actually raised, proving insufficient for the Defendant's wants, 6200*l.* more was advanced by the Plaintiffs and others.

That this 6200*l.* so paid and advanced by them to Defendant by the hands of *Gibbs* for the purchase of the annuity of 744*l.*, was really and *bonâ fide* paid by *Gibbs*, into the proper hands of the Defendant in Bank of *England* notes, of the numbers and dates indorsed on the indenture containing the grant of annuity.

That previously to this payment *Howard* and *Gibbs*, as the agents of the Defendant, had lent him considerable sums of money.

That after the payment, a statement of accounts was made by the Defendant and *Gibbs*, and upon that statement Defendant was found justly indebted to *Howard* and *Gibbs* for money lent to and paid for the Defendant by them as his agents, in the sum of 5427*l.* 1*s.* 4*d.*, which sum the Defendant thereupon paid to *Gibbs*. But

 that

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that no part of the 6200*l.* was deducted or retained by either *Howard* or *Gibbs*.

Robert Burton swore that he was employed as the Defendant's agent, and he and *James Henry Mann*, who were both present at the execution of the annuity deeds, swore that the 6200*l.* was duly paid to the Defendant, and that no part of it was with their privity, or to their knowledge, returned or paid by the Defendant to *Gibbs* at the time of the execution of the indenture, after which they left the room.

The hearing of the case having been postponed from time to time on various accounts,

Vaughan, *Pell*, and *Bosanquet*, Serjts., this term shewed cause against the rule at great length, and with considerable earnestness. The arguments, however, were in substance the same as those urged in the cases of *Williamson* v. *Goold*, (*ante* 234) and *Carroll* v. *Goold*, (*ante* 190) and after the observations made upon the credit due to the various affidavits, amounted to this:

That under the annuity acts, an annuity ought not to be set aside on the ground of retainer or return of the consideration-money, unless that retainer or return was for the benefit of the grantee of the annuity. That there was no *retainer* in the present instance, and that the *return*, if any, was not to the grantees of the annuity, but to *Howard* and *Gibbs*; but the rule sought to set aside the annuity on the ground of retainer only, and not of return.

That *Howard* and *Gibbs* were agents for the Defendant in these transactions, and not for the Plaintiffs; and that, therefore, they ought not to be affected by the acts of *Howard* and *Gibbs*.

But that, even admitting *Howard* and *Gibbs* to have been the agents of the Plaintiffs also, they were only agents under a limited authority and for a particular

purpose,

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purpose, and that the principals were responsible for the acts of their agents only while they acted within the scope of their authority for that particular purpose; that the retainer or return, if any took place, so far from being within the scope of the agent's authority in this case, was altogether inconsistent with its very nature; the authority being to transact a valid annuity, and the retainer or return having the effect of avoiding the very annuity which the authority was given to effect.

In the case of *Mootham* v. *How* (a), it was holden that the retainer by the agent for his own expences would not avoid the principal's annuity, and in principle that case was the same as the present.

The learned Serjts. urged the Court at all events to grant an issue on the subject, as there would be no appeal from their summary decision, and as the consequences of that decision would be fatal to many industrious persons who had embarked their property in the purchase of annuities.

Lawes and *Peake* Serjts. were heard in support of the rule, and contended, that the Plaintiffs ought themselves to have seen that the money was duly paid, and that not having done so, they were responsible for the acts of their agents.

The judgment of the Court was now delivered by

PARK J. These two cases are so similar in circumstances, and the questions arising out of the facts and circumstances of them are so much alike, that the Court are of opinion they may pronounce only one judgment, applicable to both, marking, however, as they proceed, such differences as exist between them.

(a) 7 *Taunt.* 596.

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Both the rules call upon the Plaintiffs in each to shew cause why the annuities granted by Sir *Thomas Champneys* should not be set aside, and why the several deeds by which these annuities are secured should not be delivered up to be cancelled, upon the ground that *a part of the consideration-money was retained;* this ground is applicable to both: but in the case of *Coventry* v. *Champneys* there is another ground peculiar to itself, namely, that the memorial was defective, in not stating the names of the persons by whom that annuity was to be beneficially received, but omitting the Plaintiff *Coventry*'s name as one of such persons. There is another ground stated in both the rules, namely, for not stating the place of abode of the witnesses.

This latter ground has been properly abandoned by the counsel for the Defendant, it not being possible to maintain that point *here*, after the decision of this Court in *Michaelmas* term last in the case of *St. John* v. *Champneys*. (*a*)

Now what are the real facts applicable to both these cases, as deduced from the various affidavits, without going through all the minute circumstances of each? An enormous sum of money was wanted by this Defendant, and he, *by his own agent*, *Burton*, applied to *Howard* and *Gibbs* to procure these various sums, and it is positively sworn and not denied, that besides 12*l. per. cent.* as the amount of the annuity interest, the Defendant was to pay the disgraceful commission of 9*l. per cent.* to these men, for effectuating this loan. And it is also sworn, that this sum with many others was retained at *the very time* by *Howard* and *Gibbs*, so that, without speaking of larger sums, there was in this transaction only about 800*l.* out of 6200*l.* paid to the credit of Sir *Thomas Champneys*, the sum of 5400*l.* being on

(*a*) *Ante*, 77.

one

one *pretence* or other *retained and kept back*. All this is in effect admitted, because not denied, by him who alone could give the Court a full and clear explanation. No account is rendered, and although one of the learned counsel talked of an account, he knew perfectly well the Court could not, consistently with their duty, attend to such a statement, and his client knew full well, that if he could have rendered an account that would have borne inspection and scrutiny, he ought to have exhibited it to the Judge who administered the oath, and therefore the rule of law, *de non apparentibus*, &c. most strictly and imperiously applies. It is true, indeed, that *Gibbs* swears, that the whole of the consideration-money was really and *bonâ fide* paid into the proper hands of Sir *Thomas Champneys*, and the witnesses to the deeds swear they saw the money paid, and none was returned in their presence. But can the Court possibly wink so hard as not to see, that all this is the machinery of these transactions? Witnesses to the deed are necessary, and to the receipt of the money: but as soon as they see the money laid down, and the deeds are executed, they leave the room. But why did they not stay? Why did they not wait and see Sir *Thomas Champneys* put it in his pocket and go away with it? Because there was a great after reckoning to take place, at which no human beings but *Gibbs* and Sir *Thomas Champneys* were to be present; when a secret transaction was to be arranged, which would not admit of any witness but the parties. Is it pretended that a moment's interval elapsed between the execution of the deeds and the payment or return of the money to *Gibbs*? The affidavit most guardedly swears, that *after* he had so paid the money (into the proper hands of Sir *Thomas Champneys*) that is, immediately, the account was settled; and 5427*l.* were paid by Sir *Thomas Champneys* to this deponent. This

therefore,

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therefore, puts an end to all those supposed cases stated at the bar, of the Defendant having gone off with the money and settled at another time; and to which the general answer is, the Court looks to the circumstances of each particular case, as proved before them; and would ill discharge their duty, if, on the one side or the other, they were to act on supposition and not on proofs. We are therefore of opinion, that these cases are made up of *pretences* and *practices*, which it was the object of the former and present statutes to put down, for now, nearly half a century, and that to shut their eyes against such practices as these, would open the door to the grossest frauds, would make every ignorant, young, or foolishly improvident person (in which latter description we class the Defendant) a dupe or prey to the most nefarious practices. In stating this it will be seen, that we do not run counter to the Court of King's Bench, or to former Judges of this Court, when they held, that this clause of the statutes under consideration is not imperative upon the Court to set aside annuities; that they will only do so wherever there is any thing of fraud, pretence, or practice, to keep back from the view of the Court the real truth of the transaction; but will not interfere, where there is nothing but mistake, inadvertence, or where the case is clearly and satisfactorily explained, as it was in *Cook* v. *Tower* (*a*) in this Court, and in the King's Bench in *Barber* v. *Gameson* (*b*), and in *Girdlestone* v. *Allan.* (*c*) Supposing, therefore, that what has been done in this case had been done by the Plaintiffs themselves; even their strenuous advocates have hardly ventured to deny, whatever may have been insinuated, that these are cases in which the Court ought to interfere: but it is said, the Plaintiffs are perfectly innocent, they have denied

(*a*) *Taunt.* 372. (*b*) 4 *B. & A.* 281. (*c*) 1 *B. & Cress.* 61.

all

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all privity or knowledge of any retaining or keeping back, and that if it was done, *Howard* and *Gibbs*, who are charged with having done so, were the agents of Sir *Thomas Champneys*, and, therefore, their misdemeanours must fall upon his head, and he must look to them; and they add, that these applications are not brought forward till *Gorton* is dead: this last point is only noticed by the way. If the charge had been, that *Gorton* himself had negotiated this business, — if he had been present when the money was paid, and could have given, if alive, any account of the transaction, it would have been for the Court to consider, whether they would have interfered, after the only witness, who could have explained the matter, had been removed by death: but this case, on the part of those who oppose the rule, proceeds entirely on the ground, that *he* could have given no explanation; and the length of time which has elapsed since the annuity was granted is not such as to create even that constructive limitation which the courts have sometimes been disposed to adopt.

Before, then, we come to the law of the case, let us first see what is the fact of *agency*. Were *Howard* and *Gibbs* the agents of Sir *Thomas Champneys* or of the respective grantees of these annuities? Upon the affidavits the Court do not, and are confident that no unbiassed person, can entertain a doubt.

In this case it is satisfactory to draw the conclusion that such is the fact, from the affidavits filed on the part of the plaintiffs themselves. *Burton*, the former but now discarded agent of Sir *Thomas Champneys*, begins by stating that he was such, and that, *as such agent*, *he* on Sir *Thomas*'s behalf applied to *Howard* and *Gibbs*. *Gibbs* swears in his affidavit, that Sir *Thomas Champneys* by or through *Burton his agent* in that behalf, and (for this is not all) a person acting generally in the management of the affairs of the said Sir *Thomas Champneys*,

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Champneys, applied to this deponent and his partner to raise him a considerable sum, &c. Clearly, then, *Burton* was the agent of the defendant; he also negotiated the whole business for him, or *Gibbs* has sworn falsely, for he proceeds to swear, that after some negotiation between him, *Gibbs*, and Sir *Thomas Champneys* by or through *Burton* as such agent for the defendant, the agreement marked A was entered into. But it is said *Howard* and *Gibbs* were also his (Sir *Thomas Champney's*) agents: this is contradicted by all the facts, for they were most clearly the full authorized agents of both *Coventry* and *Gorton*, to transact all matters of annuity for them, not only in this, but in other business of the same nature. The Court are here assuming, what they wish to believe, that *Coventry's* affidavit is true, and that if *Gorton* had been alive he would have sworn the same thing. What, then, on *Coventry's* affidavit, is the fact? That he being a gentleman residing for the last 22 years in the town of *Bedford*, holding a place of great trust and confidence under government, having long known and been acquainted with *Howard* and *Gibbs*, is not connected with them in pecuniary or other matters of business except as hereinbefore is mentioned, and matters of like nature. Now the matter before mentioned, being with respect to the purchase of an annuity, if there be any meaning in language, that must mean they had before been employed in negotiating annuities for him, nay, in the first part of the same affidavit, he states "that *Howard* and *Gibbs* were at that time possessed of a sum of money, which this deponent then, and for some time previous, had placed in their hands, which he (*Coventry*) intended to lay out by way of annuity." By whose agency was *Coventry* to lay out this money? surely by that of *Howard* and *Gibbs*; for he afterwards states that 1200*l.* was about the balance of monies of him, *Coventry*, remaining in the hands of *Howard* and *Gibbs*, so that there was a running account

 between

between these parties. If this does not constitute an agency in fact, and a most confidential agency too, the Court can hardly contemplate what state of facts will constitute such a relation.

But as we can have no affidavit from *Gorton*, how is the fact as to him upon the point of agency? much stronger: for the want of an affidavit is well supplied by the fact. In this case two books, which have never been out of the hands of one of the Judges of the Court, are referred to by the affidavits, and which were marked by the initials of my Lord C. J., as exhibited before him, when the affidavits were sworn before his Lordship, and which therefore form a part of the case. Here then is a regular pass-book like a banker's, between *Gorton* and *Howard* and *Gibbs* for three or four years, respecting the purchase of annuities, with a regular debtor and creditor account; and without looking farther than the page in question and its correspondent credit-side, which the Court were obliged to look at, there are no less than two other annuities mentioned with this on the debit-side of the account and six other annuities on the credit-side all negotiated for *Gorton* by these persons; and, therefore, notwithstanding all that has been said, it would be absurd for the Court to shut their eyes against a body of evidence of the most strong and powerful nature. Still it is strenuously contended that if these men were the Plaintiffs' agents, yet, they, the Plaintiffs, having no benefit, no knowledge, no privity, cannot be answerable for this misconduct of the agents; and we are plainly told, that if we exercise power in this case we shall constitute ourselves a tribunal with greater powers than it ever was intended by law this Court should have. In answer to the last part of the observation, we have only to say, the legislature has cast this power upon us, it is not of our own seeking. We cannot refuse to exercise it; and it has been most usefully exercised for the benefit of the country by the courts

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courts of law ever since the first of the statutes passed, viz. ever since 1777. But it is said, the act never meant to avoid and vacate an annuity on account of a retainer or keeping back by a mere stranger to the grantee, or a mere agent: it must be by some one under his influence. How does that observation apply to the present case? *Howard* and *Gibbs* were not strangers to the grantees: they were their avowed and confidential agents. The plaintiffs are living at a distance; they leave their monies in the hands of these men to manage and deal with as they please, but all in the purchase of annuities. They, (*Howard* and *Gibbs*), in the very contract, are the only open and ostensible parties, and Sir *Thomas Champneys* contracts with them, to assure annuities to such persons as shall be nominated and appointed by *Howard* and *Gibbs*. And in another part of the affidavit the consideration money is to be subject to such deduction as therein is mentioned, and Sir *Thomas Champneys* is to grant two, three, or four separate annuities at the option of *Howard* and *Gibbs*. Now if persons will trust themselves and their concerns in the hands of such men, touching a particular business, where is the hardship of saying that they must be *civilly* responsible for the acts of such agents, in the course of that employment? But we have been pressed to grant an issue on the facts of the case. It is not denied that though the Court have the power of summary decision cast upon them, if upon the affidavits there are any involved and disputed facts, upon which the conscience of the Court cannot arrive at a satisfactory conclusion, they have also a power to send the case to the best tribunal for the developement of contested facts, a jury of the country, for the satisfaction of their own minds. But are there any such difficulties in the facts here? In considering them, the Court has chiefly looked at the affidavits of the opponents of this application; and if the Court felt itself incompetent to the unravelling such a

case as this, they would be unfit to decide upon any summary application whatever.

Then as to the law, where is the novelty of what is asked for? Why have none of these fearful consequences with which we are threatened if this rule be made absolute ever been apprehended, during the last fifty years, during all which time, the acts of the agent where they amounted to frauds, pretences, or practices, have been taken for granted as civilly affecting the principal, though the contrary has never been so sturdily contended for before? It is true the word agent is not to be found in either of the acts of parliament, and yet Lord Chancellor *Thurlow* first, and Lord *Loughborough* next, upon an appeal from Lord *Thurlow*, (and be it remembered Lord *Loughborough* was the author of the first of these statutes,) set aside an annuity, because the memorial did not set forth the name of the agent, which the act does not mention, as well as the names of the witnesses which it does require. This was the case of *The Duke of Bolton* v. *Williams*. (a) And in *Dalmer* v. *Barnard* (b), Lord *Kenyon* adopts and approves that decision, and observes, that the parties there might have carried the matter to the House of Lords if the decree in Chancery in *The Duke of Bolton* v. *Williams* had given dissatisfaction. Why are these cases now mentioned? Because they prove, that all the transaction ought to be fully stated, and that the acts of the agent, though the word *agent* be not mentioned in the statute, ought to be before the court. But why should his acts be before the court if they could not influence the transaction? The Judges of other times thought it material to enquire into their acts; for the Lord Chancellor said "it was essential to the justice of the case, that the name of the agent as well as the principal should be set forth: why? that the whole *res gestæ* might appear

(a) 2 *Ves.* jun. 138. (b) 7 *T. R.* 249.

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for the sake of a direction to every quarter from whence information may be collected :" and in the next sentence one may imagine that the present case was almost foreseen by his Lordship ; " The legislature foresaw that much mischief was done by effecting transactions of this kind in a private room, where the money was paid by an agent who received a large premium, while the person actually advancing the money was in an adjoining room ; and if the agent's name were not disclosed, so that recourse might be had to him to know what really passed, the truth could not be obtained, since in such case the principal not being present could not give the information."

The case of *Mootham* v. *How* (*a*) is also of the strongest possible weight; and the causes we decided in last *Michaelmas* and *Hilary* terms, of *Groom* v. Sir *Thomas Champneys* (*b*), and *Williamson* v. *Goold* (*c*), are all to the same effect; and the Court think that if we did not put the construction we now do upon the act of parliament, parties would have the opportunity of doing the very thing that the statute meant to prohibit: and it would virtually operate as a repeal of the statute, for the parties would always take care never themselves to mix in the transaction; but though living at *Bedford* or any other place, by having such men to traffic with their money put it completely in their power to commit the most nefarious frauds upon those improvident, foolish men, round whom, and to protect them against their own imprudence, nay, to save them from themselves, this act was thrown as a strong and powerful guard: and all the beneficial and salutary objects of the statutes would be entirely frustrated by the narrow construction now contended for, and so vehemently and strenuously pressed upon us. Whether this be a remedial or a penal law, the Court need not discuss: but it is a law

(*a*) 7 *Taunt.* 596. (*b*) See St. *John* v. *Champneys*. ante 77.
(*c*) *Ante*, 234.

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to prevent and suppress frauds; and it is a clear and fundamental rule in construing statutes against frauds, that they are to be liberally and beneficially expounded; and in our best text-book this position is to be found, "that where the statute acts against the offender and inflicts a penalty, it is then to be construed strictly: but where it acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally." With these sentiments, and upon these principles, the Court are of opinion these annuites cannot be supported: and notwithstanding all the dreadful consequences with which such a decision is prognosticated to be followed, we think, on the other hand (and we have not come to this conclusion without much deliberation), that our decision upon this point will better accord with the object of the legislature, and will be most subservient to the best interests of mankind.

This is our opinion on the first point, as applicable to both these cases: the second ground is applicable to *Coventry*'s annuity only, viz. that his name is not inserted in the memorial as a person beneficially interested. Upon this part of the case there is a good deal of nicety: but having formed the opinion just delivered on the first point, we think it unnecessary to come to any determination upon this.

As then the statute has given us a discretion either to make the rule absolute generally, or absolute upon condition, or wholly to discharge it, according to the circumstances of each particular case, we, in the exercise of that discretion, think that these cases fall within the second class; and that these rules must be made absolute, upon condition that Sir *Thomas Champneys* shall pay such sum for principal and interest as the prothonotary shall find due, upon fairly taking the account between these parties, as in the former case of *Groom*

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v. *Sir T. Champneys*, which we finally disposed of the other day.

Rules absolute accordingly.

June 10.

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The Defendant agreed to take an assignment of Plaintiff's house and premises, without requiring lessor's title; that he would pay 2300*l.* for it, and also the amount of goods, fixtures, and effects, and take possession of the house on or before *September* 29th; the Plaintiff agreed to give up possession of the premises, effects, and stock by that day, to assign licences, to repair or allow for all damaged outside windows, and to clear rent, taxes, and outgoings to the day of quitting possession. The expenses of the agreement were to be paid by the parties in equal moieties; and either party not fulfilling all and every part, was to pay to the other 500*l.*, thereby *settled and fixed as liquidated damages*:

Held, that on breach of the agreement by omission to take an assignment, the Defendant was liable to pay the whole 500*l.*; and that it was not a mere penalty to cover such damages as might be actually incurred.

ASSUMPSIT on the following agreement.

This agreement, entered into this second day of *August*, 1822, between *Michael Reilly*, of *Oxford-street*, victualler, of the one part; and *Edward Jones*, of *Tothill-street*, of the other part: witnesseth, that in consideration of the sum of 2300*l.*, the said *Michael Reilly* doth agree to sell unto the said *Edward Jones*, the lease of the house and premises situate, lying, and being the sign of the *Delaware Arms*, *Oxford-street*, aforesaid, as he holds the same, at the nett annual rent of 75*l.*, for the term of fourteen years and an half from *Michaelmas* day last; also his goods, fixtures, and effects, now on the said premises, and which he has a right to sell, at a fair valuation by two appraisers or their umpire; and his saleable stock in trade. Porter not exceeding twelve butts; ales thirty barrels; wines, foreign and *British* spirits, and compounds, 150*l.*: to be valued by proper gaugers or their umpire. And the said *Edward Jones* doth agree to take an assignment of the said lease and premises

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premises as above described, without requiring the lessor's title; and that he will pay unto the said *Michael Reilly* the sum of 2300*l.* for the said lease, deducting the deposit of 50*l.* now paid; also the amount of goods, fixtures, effects, and stock, as aforesaid, together with the amount of the unexpired term of the licences; and take possession of the said house and premises, on or before the 29th day of *September* next: at which time, and upon payment therefore, he, the said *Michael Reilly*, doth agree to deliver up possession of all the said premises, and also the effects and stock; and to assign over good and sufficient licences; to repair or allow for all damaged outside windows; and to clear the rent, taxes, and outgoings, to the day of quitting possession. And, lastly, it is hereby agreed, that all law and other expences of carrying this agreement into effect, shall be paid by the said parties in equal moieties; and that *either of them not fulfilling all and every part, the party not fulfilling shall pay unto the other the sum of* 500*l. hereby settled and fixed as liquidated damages; the deposit now paid to be considered as part of the said damages in case of default made by the said* Edward Jones, *or returned in addition to the said damages in case of default being made by the said* Michael Reilly. As witness our hands the day and year first above written.

Witness
James Scriven, *M. Reilly.*
John Langdon. *E. Jones.*

Breach, that the Defendant did not accept an assignment of the said lease, or take possession of the said house and premises, goods, fixtures, and effects, and stock in trade, on or before the 29th day of *September* next after the making of the agreement, or since.

At the *Middlesex* sittings after *Michaelmas* term last, a verdict was found for the Plaintiff for 50*l.*, with liberty

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for him to move to increase it by 400*l.*, the balance of the liquidated sum for which the action was brought.

Vaughan Serjt. having accordingly obtained a rule *nisi* to that effect,

Lens and *Lawes* Serjts. now shewed cause. Though the expression *liquidated damages* is employed in this agreement, yet, taking the whole agreement together, it must be considered that the 500*l.* was intended not for liquidated damages, but as a penalty; in which case the Plaintiff would only be entitled to recover for the damage he actually sustained. This sum might have been considered as liquidated damages if it had been stipulated as the security for the performance of a single act, *Barton* v. *Glover* (*a*); but the rule is, that where a deed or agreement contains provisions for the performance of several things, and then a large sum is stated at the end to be paid upon the breach of performance, that must be considered as a penalty (*b*); and its being called liquidated damages will not alter the case. If the rule were otherwise, a party might, in such a case, pay the whole sum for breach of any one of the most unimportant and trivial of the provisions in the agreement. [*Dallas* C. J. If the damage occasioned by breach of the most material provision amounted to more than the stipulated sum, could not the party refuse to pay more?] Where the sum is considered a penalty, there are cases in which he may pay more. In *Low* v. *Peers* (*c*), *Rolfe* v. *Peterson* (*d*), and *Fletcher* v. *Dyche* (*e*), the stipulated sum was to secure the performance of a single act, and therefore those cases are distinguishable from the present. But in *Astley* v. *Wel-*

(*a*) 1 *Holt*, 43.
(*b*) *Per Heath* J. in *Astley* v. *Weldon*, 2 *B. & P.* 353.
(*c*) 4 *Burr.* 2229.
(*d*) 2 *Br. Parl. Cas.* 437.
(*e*) 2 *T. R.* 32.

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don (*a*), where the Defendant agreed to pay a sum if he did not perform at the Plaintiff's theatre, it was holden that the sum agreed on should be a security for the damages actually incurred by breach of the agreement; and that must be taken to have been what the parties meant on the present occasion. Though there may be no case where the expression *liquidated damages* has been held to operate merely as affixing a penalty for the security of actual damages; yet there is, on the other hand, no case in which the Court have considered themselves as tied down, and, by the employment of that expression, precluded under any circumstances from considering it equivalent only to the term *penalty*. The statute of *William*, which enables a Plaintiff to assign several breaches in an action on a bond conditioned with a penalty for the performance of several things, affords a strong reason for contending that the Plaintiff ought, under an agreement for a sum stipulated by way of security, to recover only such damages as he has actually incurred; otherwise the statute would be nugatory, and the same sum must be paid for the breach of conditions of very different degrees of importance, which never could have been the intention of the parties.

DALLAS C. J. In this case, on the construction of this agreement, I think the damages stipulated for are to be considered as liquidated damages, whatever may be the construction of other cases: but I avoid grounding my opinion on any of them, having a clear opinion upon the whole of this agreement taken together.

PARK J. I think the Plaintiff is entitled to recover the 500*l*. No case has been adduced, in which, after the parties have themselves employed the expression

(*a*) 2 *B. & P.* 346.

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liquidated damages, the court has holden the Plaintiff should not recover, on breach of the agreement, the sum named as stipulated damages. I will not say there is no such case; but looking at the agreement itself in the present instance, I found my opinion on what appears to be the clear intention of the parties. As to the particular case of *Astley* v. *Weldon*, I concur in the decision there given; but the agreement in that case contained no such expression as *liquidated damages*. I do not admit the assumption, that the present is an agreement for the performance of several things; in substance it is for the performance of only one: the vendor was to leave, and the vendee was to take possession. The language which contains the stipulation for liquidated damages is exceedingly clear and precise, and even the 50*l*. paid down was to be considered as part. The decisions all concur in laying it down, that the intentions of the parties ought to be pursued; and about those intentions there can be no doubt in the present instance.

BURROUGH J. There is no case which has decided that the Defendant shall not pay the whole sum, where the expression *liquidated damages* has been employed to designate the nature of the payment. In all the cases the question has been, what was meant by the parties; and great inconvenience would ensue from non-compliance with their intention on either side. The statute of *William* operates only in cases of penalty, and was passed to relieve the Plaintiff, by enabling him to assign more breaches than one, which he could not do at common law; but it is begging the question to say that the sum mentioned in this agreement was meant as a penalty, and not as liquidated damages.

Rule absolute.

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LONGRIDGE and Others *v.* BREWER.

June 12.

Practice. Staying proceedings.

THE Plaintiffs having recovered 1*s*. damages in this case, notwithstanding the omission of the surname of one of them on the *Nisi Prius* record; and the Court, on the ground of that omission, having refused to increase the damages to the sum the Plaintiffs sought to recover, (see *ante*, 143.) they sued out execution for costs on the verdict for 1*s*., and brought a fresh action for the sum they originally sought to recover; although they had refused, on the motion for increasing damages, an offer to amend on payment of costs, and had taken the verdict for 1*s*., in preference to being nonsuited at the trial.

But the Court, on motion by *Pell* Serjt. to set aside the execution or stay the proceedings in the second action, after hearing *Vaughan* Serjt. against the rule, staid the proceedings in the second action, the Defendant not having pleaded.

CROOKE *v.* M'TAVISH.

June 12.

Under the 28 *G.* 3. *c.* 37. which limits the commencing of actions against officers of the customs to *three months* after the matter or thing done; but enacts that the officer shall have a *calendar* month's notice of action, and a *calendar* month in which to tender amends: Held, that actions against such officers must be commenced within three *lunar* months after the matter or thing done.

IN the statute 28 *G.* 3. *c.* 37., there are, among others, the following enactments:

Sect. 23. "If any action or suit shall be brought

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or commenced against any person or persons, for any thing by him or them done in pursuance of this or any other act or acts of parliament now in force, or hereafter to be made relating to his majesty's revenues of customs and excise, or either of them, such action or suit shall be commenced within *three months* next after the matter or thing done."

Sect. 25. "No writ or process shall be sued out against any officer of the customs or excise, or against any person or persons acting by his or their order in his or their aid, for any thing done in the execution, or by reason of this or any other act or acts of parliament now in force, or hereafter to be made, relating to the said revenues, or either of them, until one *calendar month* next after notice in writing shall have been delivered to him or them, or left at the usual place of his or their abode."

Sect. 26. "It shall and may be lawful to and for any such officer or officers, or other person or persons acting in his or their aid, to whom such notice shall be given as aforesaid, at any time within one *calendar month* after such notice shall be given, to tender amends to the person or persons complaining, or to his or their agent or attorney."

Within three *calendar*, but not within three *lunar* months after the matter or thing done, the Plaintiff had sued the Defendant, an officer in the preventive service, for an alleged unjustifiable seizure and detention of the Plaintiff's ship, (see *ante*, 167.); and upon a special case, the question for the opinion of the Court was, whether under the foregoing act of parliament this action was commenced in time.

Taddy Serjt. for the Plaintiff. The action was commenced in time. In all the cases on acts of parliament where the courts have holden, that the word *month* is to be construed *lunar month*, the word *month* has been em-

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employed through the act uniformly without any adjunct. In *Lacon* v. *Hooper* (*a*), Lord *Kenyon* says, "In all acts of parliament, where months are spoken of, without the word *calendar*, and nothing is added from which a clear inference can be drawn, that the legislature intended calendar months, it is understood to mean lunar months." Now here there is something added from whence an inference may be drawn, that by the word *months* in the 23d section, the legislature meant calendar months, for they must have intended to place the parties upon an equal footing; and if, by the 25th and 26th sections, the Defendant is to have a calendar month's notice before action, and a calendar month in which to make amends, the Plaintiff ought to have calendar months in which to sue. No case has yet been decided where the expressions *months* and *calendar months* have both occurred in the same act; but if the word *month* (which, in the 23d section of this act, appears to have been inadvertently employed instead of *calendar months*) is to be construed as lunar months, not only will the Plaintiff and Defendant be placed on an unequal footing, but the Plaintiff in the case of a continuing trespass, if he must sue within three lunar months, and must give a calendar month's notice, will be able to recover for little more than six or seven weeks in his first action, although the trespass may have lasted three months. Such an injustice towards the Plaintiff could never have been the intention of the legislature; and in statutes as well as in contracts, the intention ought to be the guide to construction. This is quite clear in matters of contract. In *Lang* v. *Gale* (*a*) *Le Blanc* J. says, "In matters temporal the term *month* is understood to mean lunar month, whilst in matters ecclesiastical it is deemed calendar; because in

(*a*) 6 *T. R.* 226. (*b*) 1 *M. & S.* 117.

each

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each of those matters a different mode of computation respectively prevails: the term, therefore, is taken in that sense which is conformable to the subject-matter to which it is applied. Still, in matters of contract the question will ever be, what was the intention of the contracting parties at the time when they made use of the word." The same rule was observed in *Cockell* v. *Gray*. (*a*) In *Catesby's* case (*b*), *tempus semestre* was holden to mean calendar months. The construction of the word, therefore, is not inflexible, but must depend on the context; and it would be inconsistent and unjust to employ it in two different senses in the same act of parliament.

DALLAS C. J. The legislature must be taken to know the distinction between lunar and calendar months; and when, in its ordinary acceptation, the word *month* means lunar month, and the adjunct calendar may be used for the purpose of making a distinction, can we construe the act differently from the plain and obvious import of the words actually employed? I entertain no doubt that the word *calendar* was inserted emphatically in the 25th and 26th sections of the act. If it had not been used at all, there might be more ground for the argument with which we have been pressed.

PARK J. One of the earliest things we learn is, that the word *month*, *ex vi termini*, means a lunar month. In mercantile matters there may be usage to the contrary, but in general, if the word *month* is used, lunar month is meant, and therefore, we always add the word *calendar* when it is desired that the computation should be by calendar months. *Catesby's* case was touching ecclesiastical matters, in which it is the usage to com-

(*a*) 2 *B.* & *B.* 186. (*b*) 6 *Rep.* 62.

pute

pute by calendar months. But in that case Lord *Coke* says, that though a lease for a twelvemonth would give an interest for a year, a lease for twelvemonths would give an interest for no more than forty-eight weeks. In the present case, the calendar month seems to have been given expressly in favour of the officer, to afford him ample time to tender amends.

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BURROUGH J. concurred.

Judgment for the Defendant.

MAYER and Others, Assignees of DAVISON, a Bankrupt, *v.* NIAS.

June 14.

The Defendant, who had ordered goods for ready money, paid for them by returning to the vendor's agent a bill accepted by vendor, which had been due and dishonored before the goods were ordered; the agent at first refused to take the bill, but ultimately carried it home to the vendor, who kept it. The vendor having become bankrupt, the Court, in an action brought by his assignees to recover the value of the goods, held this transaction equivalent to payment, no fraud having been established.

ASSUMPSIT for the value of goods sold to the Defendant by the bankrupt before his bankruptcy, and upon an account stated with the bankrupt before his bankruptcy; plea, general issue. Upon the trial of the cause at the *London* sittings in last *Easter* term, the bankrupt's brother proved that the goods were to be paid for in ready money; that the Defendant having sent to say he would pay the amount (132*l.*) if the bankrupt would send a receipt, the witness waited on him for payment, when the Defendant, who had advanced 20*l.* on giving the order for the goods in *May*, 1822, instead of paying 112*l.* down, deducted 6*l.* 12*s.* discount for ready money, gave a check for 14*l.* 17*s.*, and a dishonoured bill for 90*l.* 11*s.*, drawn by *Reed* and Co., accepted by the Defendant, and due in the *April* pre-

ceding;

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ceding. The witness strongly protested against this mode of payment, and at first refused to take the bill; but upon its being thrown down, ultimately took it up and carried it to his brother, who kept it.

There were also circumstances touching the manner and time in which the Defendant became possessed of the bill, his supposed knowledge of the bankrupt's situation, and of the bankrupt's having deposited goods with the drawers of the bill as a security for the payment of it; from which the Plaintiffs proposed to shew that the whole transaction was bottomed in fraud: but some of these circumstances being disputed, and the Court having held, that no fraud appeared on the Judge's report of the trial, it becomes unnecessary to detail them.

The learned Judge who presided at the trial having intimated that the facts disclosed by the bankrupt's brother amounted to a payment by the Defendant, a nonsuit was entered, with liberty for the Plaintiffs to move to set it aside and enter a verdict for 112*l.*

Vaughan Serjt. having obtained a rule accordingly,

Pell Serjt. shewed cause against it, contending that the bankrupt's brother having carried away the bill, and the bankrupt having retained it, there had been a complete payment; and that the retainer of the bill by the bankrupt distinguished the case from that of *Fair* v. *M'Iver* (a), where the Defendant, still holding a dishonoured bill, attempted to enforce it by way of set off, though at the time he took it he knew the circumstances of the bankrupt.

Vaughan, in support of his rule. Payment by a dishonoured bill was no performance of the Defendant's contract to pay in ready money. [*Park* J. *Eland* v.

(a) 16 *East*, [illegible]o.

Karr,

Karr, decides the contrary. (*a*)] Then from the circumstance of the Defendant's giving the order for the goods in *May*, some weeks after the bill was due, joined to the mode of payment, it must be inferred, that the goods were ordered with the express view of getting value for the bill; and if so, the case is the same as that of *Fair* v. *M'Iver*.

DALLAS C. J. I think this rule ought to be discharged: no fraud has been actually made out; and if so, the Defendant must be considered as having been lawfully in possession of the bill. Taking this to be the case, was it accepted in payment? It was thrown down, and perhaps rejected at first; but it was then taken up, carried to the bankrupt, and retained by him. Assuming that the Defendant came honestly by the bill, it was a fair article of set off; and the return of it must be deemed equivalent to payment.

PARK J. This was a bill for which the bankrupt was always liable. His brother, indeed, at first refused to take it, but by carrying it away confirmed the bankrupt's liability; and the bill was never sent back. The case of *Fair* v. *M'Iver* proceeded on the ground of a fraud upon the other creditors; but *Eland* v. *Karr* comes much nearer the present case, if (as I believe) there was no fraud in the transaction. It is true, that in *Fair* v. *M'Iver*, Lord *Ellenborough* says he is not convinced by the decision of *Eland* v. *Karr*; but there is no case in which the authority of Lord *Kenyon* has been overruled.

BURROUGH J. concurred.

Rule discharged.

(a) 1 *East*, 375.

(IN THE EXCHEQUER CHAMBER.)

June 16.

MAY and Others, Plaintiffs in Error, *v.* PIGE, Defendant in Error.

Bill against *James May* the elder, *William James Norton*, and *James May* the younger. On the *postea* it was alleged that "the jury say that *James May* the elder, *William Norton*, and *James May* the younger, did undertake, as the Plaintiff hath above complained against them." Judgment, "that the Plaintiff do recover against the *said Defendants*:"

Held, that the omission of the name *James* in entering on the *postea* the finding of the jury, was no ground of error.

THE Defendant in error had recovered damages on the eighth count of a declaration against the Plaintiffs for negligently conducting a suit in which they had been employed as attorneys; and upon error from the King's Bench, among numerous other objections it was assigned for error that in the said record it was stated, "that the jury summoned to speak the truth of the matters within contained, being chosen, tried, and sworn upon their oath, say as to the promise and undertaking in the eighth count of the within bill mentioned, that the said *James May* the elder, *William Norton*, and *James May* the younger, did undertake and promise in manner and form as the said *Stephen Pigè* hath within in that count complained against them; and they assess the damages of the said *Stephen Pigè* on occasion of the not performing the promise and undertaking in that count mentioned, over and above his costs and charges by him about this suit in that behalf expended, to two hundred pounds, and for those costs and charges to forty shillings; and as to the several promises and undertakings in the other counts of the within bill contained, the jurors aforesaid, upon their oath aforesaid, say, that the said *James May* the elder, *William Norton*, and *James May* the younger, did not, nor did either of them, undertake or promise in manner and form as the said *Stephen Pigè* hath within, in those counts complained against them; therefore it is considered that the said

 Plaintiff

Plaintiff do recover against the said Defendants, as to the promise and undertaking in the eighth count of the said bill mentioned, his damages, costs, and charges by the jurors aforesaid in form aforesaid assessed:" whereas in truth and in fact there is no such person in the said bill, or in the said eighth count of the said bill mentioned, as *William Norton*; and therefore there is a manifest discrepancy and variance in the alleged finding of the said jury and the judgment of the court, the finding of the said jury being that *James May* the elder, *William Norton*, and *James May* the younger did undertake and promise in manner and form as aforesaid, and the judgment of the court being against the said Defendants, who are within the bill named and called *James May* the elder, *William James Norton*, and *James May* the younger."

Holt for the Plaintiff in error. A court of error cannot amend this defect in the finding of the jury. [*Per curiam.* It is not proposed to make any amendment.] Then the defect is fatal as a variance; for the Plaintiffs in error are entitled to a perfect record. If another action were brought against them for the same cause, they could not plead this record as a judgment recovered, nor could a co-Defendant recover contribution; for he would be nonsuited if he produced this record in proof of an action in which he had been adjudged to pay damages jointly with *William James Norton*. The judgment indeed is against the said Defendants, but judgment can only be warranted by the finding of the jury. "Said" is a word of reference, and there is no *William Norton* in the bill to which the finding of the jury can refer. After the finding of the jury, there being no day in court on which this defect could be pleaded in abatement, it can only be taken advantage of on error, and there must be a *venire de novo*. The defect must be

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be esteemed material; for proceedings have been set aside, on the ground that a Defendant having two Christian names, was sued by only one of them. *Arbouin* v. *Willoughby*. (a) A sheriff's officer cannot justify an arrest of *J. C. S.*, by shewing that a latitat issued against *J. S.*, and averring that it issued against *J. C. S.* by the name of *J. S.*, and that they are one and the same person. *Shadgett* v. *Clipson* (b), *Cole* v. *Hindson* (c), *Rex* v. *Sheriff of Surry*. (d)

But the Court, without hearing the counsel for the Defendant in error, determined that the Defendants having been properly named in the bill, upon which alone the finding of the jury could be warranted, and the judgment being, according to the modern course of pleading, against the *said Defendants*, there was no ambiguity, or ground for the objection taken; and they

Affirmed the judgment of the court below.

(a) 1 *Marsh.* 477.
(b) 8 *East*, 328.
(c) 6 *T. R.* 234.
(d) 1 *Marsh.* 75.

June 17.

WILLIAMSON *v.* GOOLD.

Where an annuity was set aside upon the grantor's paying what should be found due for principal and interest at five *per cent.*, the Court allowed the grantee his fair disbursements for the conveyances by which the grant of annuity was effected and secured.

THE prothonotary having been directed to ascertain what was due for principal and interest at five *per cent.*, in the matter of the annuity granted by the Defendant to the Plaintiff, and set aside last term (see *ante*, 171.), the Court held, upon exception to the prothonotary's report, that the Plaintiff was entitled to all fair disbursements for the conveyances by which the grant of annuity was effected and secured.

RECOVERY.

June 17.

PELL Serjt. obtained leave to amend a recovery, by removing the words "an inbound common" from a line in which they had been inadvertently inserted, and where they had no meaning, to the line in which they ought to have stood.

LAMBERT *v.* HODGSON and PRINCE.

June 18.

Declaration of two counts for assault and imprisonment. Plea, that Defendant being bail for Plaintiff, arrested him to render him in discharge, and detained him till he had satisfied the demand in the action. Replication, *de injuria*.

It appeared that Defendant, in addition to detaining Plaintiff till he satisfied the demand in the action, detained him an hour longer till he paid the expenses of the Defendant's becoming bail, &c.:

Held, that this was one continuing trespass, and that therefore, in order to recover for that part of it which was unjustifiable, (namely, the additional detention for the bail's expences,) the Plaintiff ought to have newly assigned.

TRESPASS. First count for assaulting the Plaintiff, seizing him, and compelling him to go from *Bishop Auckland* to *Stockton*, and there imprisoning and detaining him without reasonable or probable cause, for divers, to wit, three days. Second count for assaulting, and compelling him to go with Defendants to divers places, and then and there imprisoning and detaining him in prison without reasonable and probable cause, for divers, to wit, three days. Pleas by *Hodgson*, first, general issue; second, that *Hodgson* and one *Wilkinson* were bail for Plaintiff in an action brought against him by *Hannah Wetherell*, and the action being still depending, *Hodgson* seized the Plaintiff, to render him to the custody of the marshal of the *Marshelsea* in dis-

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charge of the recognizance entered into by *Hodgson* and *Wilkinson*, took him to *Stockton* where *Hannah Wetherell* lived, because he was desirous of settling the action with her, and detained him there till he made satisfaction as to the demand for which the action was commenced, and was discharged from the suit.

Replication. *De injuriâ.*

Prince suffered judgment by default. At the trial before *Bayley* J. at the *Durham* Spring assizes, it appeared that the Defendants, in addition to detaining the Plaintiff at *Stockton* till he had made satisfaction for the money sought to be recovered by *Hannah Wetherell*, detained him there an hour longer, till he gave them, after resisting the demand, a promissory note for the amount of the expences incurred by them, in putting in bail, and in arresting him for the purpose of the render in discharge of his bail.

The learned Judge seeming to be of opinion, that the plea did not cover the whole of the declaration, a verdict was found for the Plaintiff, for 39*s.* damages.

Lens Serjt. obtained a rule *nisi* to set aside this verdict, and enter a verdict for the Defendant, *Hodgson*, on the ground that the trespass stated in the declaration, as well as that proved at the trial, was one continuing trespass, and therefore covered by the plea: that although, if there had been two separate and distinct detentions, the Plaintiff might, notwithstanding the plea, have proved the second detention under the second count of the declaration, yet the whole trespass, as it existed, being answered on the face of the plea, that part of it which was illegal, (namely, the extension or continuation of it after *Hannah Wetherell* had been satisfied,) could only be proved under a new assignment, distinguishing such illegal continuation from that part of the trespass which was clearly justifiable: and that in the absence

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absence of any such new assignment, the Defendant's plea entitled him to a verdict: for this, were cited *Pyewell* v. *Stowe* (*a*), *Momprivatt* v. *Sheriff of Middlesex.* (*b*)

Peake Serjt. now shewed cause against the rule, when the Court observing, that the only question was, whether what had passed was to be considered one continuing trespass or two distinct trespasses, *Peake* contended that there had been two distinct trespasses; that the first must be taken to have ended when the Plaintiff had satisfied *Hannah Wetherell;* and the second to have commenced when the Defendant demanded the expences he had incurred in putting in bail, and detained the Plaintiff anew till he complied with that demand. If there were two imprisonments, there was no necessity for a new assignment, as the declaration contained two counts. *Bull. N. P.* 17. 1 *Wm's Saunders*, 299. *note* 6.

But the Court were clearly of opinion, that the trespass was one continuing trespass; and that, therefore, the Plaintiff ought to have newly assigned in order to recover for that part of the trespass which was unjustifiable.

Rule absolute.

(*a*) 3 *Taunt.* 425. (*b*) 2 *Campb.* 175.

(IN THE EXCHEQUER CHAMBER.)

July 16.

CAMPBELL v. JAMESON and Another.

Bankruptcy and certificate are no discharge to a bond given under 4 G. 3. c. 33. by a trading member of parliament, where the judgment in the suit in which the bond was given is obtained after the bankruptcy, though before certificate.

ERROR, from the court of Kings Bench, in an action of debt on bond. The Plaintiff, in error, had pleaded his bankruptcy, and a certificate under it, which bore date *June* 22. 1819. By the replication it appeared that the bond had been given by a member of parliament, with sureties, under 4 G. 3. c. 33. s. 1., and was conditioned for the payment of such a sum as should be recovered in a certain action, then pending in the Court of Common Pleas, between the Defendants in error, and Plaintiff in error, together with such costs as should be given in the same. Averment, that after the bankruptcy judgment was given in the action, in the Common Pleas, against the Plaintiff in error, for the sum of 289*l.*, and so the bond was forfeited by nonpayment of that sum. Demurrer, joinder, and judgment for the Defendants in error. (*a*)

This case was argued in *Michaelmas* term last, by *Wilde*, for the Plaintiff in error, and *Parke*, for the Defendants in error; and again in this term, by *F. Pollock*, for the Plaintiff in error, and *Campbell*, for the Defendants in error.

For the Plaintiff in error the heads of argument were as follow:

First, the bond was only a collateral and dependent security for a pre-existing debt, which debt was proveable under the commission of bankrupt, and released and discharged by the certificate. *Vansandau* v. *Corsbie*. (*b*) *Scott* v. *Ambrose*. (*c*)

(*a*) 5 *B. & A.* 250. (*b*) 3 *B. & A.* 13. (*c*) 3 *M. & S.* 326.

Secondly,

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Secondly, the original debt being thus released, the accessorial debt, created by this bond, is affected by the same incidents as its principal, and is therefore released also. Except the case of a bail-bond, there is no instance in which a discharge of the original debt does not effect a discharge of the security also. But a bail-bond is very distinguishable from the present, which is conditioned for the payment of such sum as shall be recovered in the action; whereas, a bail-bond is conditioned for the performance of a collateral act, viz. the appearance of the Defendant. It is true, a bankrupt, notwithstanding a certificate, is liable, upon his covenant, to pay the growing arrears of an annuity, *Cotterel* v. *Hooke* (a), *Ex parte Granger* (b); but such a covenant to pay a future debt is very different from a security (like the bond in the present case) to pay a pre-existing debt. The pre-existing debt being discharged, the security is discharged along with it; and, in the case of the annuity, though the covenant, which is a continuing security, is not discharged with respect to arrears coming due after the bankruptcy, yet a bond to secure the same annuity is discharged, because it could only be put in suit once, and therefore applies to pre-existing debt.

Thirdly. However, the security itself was a debt proveable under the commission, and therefore discharged by the certificate. This bond was not, according to the language of 7 *G.* 1. *c.* 31., a security for a sum "not due or payable before the time" of the obligors becoming bankrupt, and the debt for which it was given did not rest on any contingency, (in which case the bond would not have been proveable even under the statute, *Tully* v. *Sparkes* (c),) but was a debt actually due and sued for, and a debt which might have been proved under the commission. The bond, therefore, might have

(a) *Doug.* 97. (b) 10 *Ves. jun.* 351. (c) 2 *Ld. Raym.* 1546.

been

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been proved at common law; of which, according to Lord *Kenyon* (a), the statute is only declaratory. Such a bond, indeed, differs in no respect from a bond conditioned to submit to arbitration, which has always been holden to be discharged by certificate.

It may be urged, that the sureties who joined with the Plaintiff in error, in this bond, might be sued by the obligee, and then, in another action, recover from the Plaintiff in error whatever they might have been compelled to pay; but by the 49 *G.* 3. *c.* 121. the sureties are allowed to prove, under the commission, whatever debt they pay, so that no circuity of action is to be apprehended in discharging the bankrupt from his bond, and as all the statutes relating to bankruptcy are in *pari materia*, the 7 *G.* 1. *c.* 31., and 4 *G.* 3. *c.* 33. are to be construed with reference to the state of things existing under the enactments of 49 *G.* 3. *c.* 121.

Fourthly, the main object of the statutes relating to bankruptcy, viz. the equal distribution of the bankrupt's effects among all his creditors, will be defeated, if it be holden that such a bond as this is not discharged by certificate, for any creditor who shall exact from his debtor a warrant of attorney, to enter up judgment for the debt due, and a bond conditioned for the payment of the sum to be recovered by the judgment, and who shall be cautious not to enter up judgment till after a commission of bankrupt has issued against the debtor, may afterwards, notwithstanding a certificate, sue the bankrupt on his bond, and so obtain the whole of his debt. By such a decision will also be defeated another main object of those statutes, viz. the securing a discharge to the honest debtor. No good reason can be assigned why a bankrupt member of parliament should be deprived of that advantage which the statues afford

(a) In *Utterson* v. *Vernon*, 3 *T. R.* 546.

to

to every other bankrupt who conducts himself with integrity.

Arguments for the Defendants in error.

The bond was not proveable under the commission, and therefore is not discharged by the certificate. Till the judgment was recovered in the action in the Common Pleas it could not be ascertained whether or no there was any debt due, or payable, from the bankrupt to the Plaintiff in that action. The bond, therefore, being conditioned for a sum which could not be affirmed to be due and payable at the time the obligor became bankrupt, was a bond which could only be proved under the commission, if at all, by virtue of 7 *G.* 1 *c.* 31., and not at common law. *Callowell* v. *Clutterbuck*. (*a*) But as it was uncertain, when the bond was given, in whose favour the court of Common Pleas might decide, the debt arising on the bond was clearly contingent, and the bond consequently not proveable under the statute; the statute requiring a rebate of interest on the proof of debts payable *in futuro*, which rebate cannot be calculated where the debt itself is contingent. The present case is not distinguishable from that of a bail-bond, from which the bankrupt is not discharged by his certificate, where the bail-bond has not been forfeited at the time of bankruptcy. (*b*) The cases of *Bouteflour* v. *Coates* (*c*) and *Dinsdale* v. *Eames* (*d*), shew that the obligor, in the bail-bond, is only discharged where the bond has been forfeited before the bankruptcy. Neither is this any hardship on the Defendant, because his sureties are clearly liable, and if they pay the debt they would afterwards have a claim against him.

The judgment of the court below was affirmed.

(*a*) Cited in *Tully* v. *Sparkes*, 2 *Str.* 867.

(*b*) *Cockerill* v. *Owston*, 1 *Burr.* 436.

(*c*) *Cowp.* 25.

(*d*) 2 *B. & B.* 8.

1823.

Gregory v. Hurrill.

In *June*, 1812, *A.* sued *H.* and *G.* in the King's Bench, for a debt of 1000*l.*, and *G.* being abroad, writs of *alias capias* and *pluries capias*, returnable in *Michaelmas* term, 1812, and *Hilary* term, 1813, were issued against him with a view to outlawry, but a commission of bankrupt having been taken out against *H.*, the proceedings in outlawry against *G.* were suspended. Except touching at *Deal* in *April*, 1814, on his passage from *St. Ubes* to *Dort*, *G.* never returned to *Great Britain* till *July*, 1819. In *February*, 1821, *A.* commenced a new action in K. B. against *G.* for the same debt as was the subject of the former action, but having failed in his attempts to arrest *G.*, issued, upon this debt, a commission of bankrupt against him in *March*, 1821, and in *July*, 1821, after *G.* had commenced an action to try the validity of the commission, but before trial, entered up continuances in the action commenced *June*, 1812: Held, that at the time of issuing the commission of bankrupt, the debt in question was a good petitioning creditor's debt.

THE Lord Chancellor sent the following case for the opinion of this Court.

In the year 1811 one *Rupert Leigh Hipkins* (since deceased) and *George Barnard Gregory* having entered into a commercial speculation, or adventure in a cargo of goods, a partnership agreement was drawn up and signed by both parties.

On the occasion of entering into the agreement *R. L. Hipkins* and his wife transferred 3000*l.* bank annuities, into the name of *Benjamin Walsh*, the broker, to answer the purposes of the speculation, who thereupon agreed to become the agent of the concern, upon the usual terms of interest, and a commission of 2½ *per cent.* being allowed upon the amount of all advances and payments made by him in the course of such agency. The proceeds of the cargo were to be remitted to *Walsh* for the payment of such advances.

Various goods were purchased, and the different merchants and tradesmen were referred to *Walsh*, who either paid in cash or accepted bills of exchange for the amount.

The goods were shipped on board the ship *Irvine*, bound to *Algiers*, and *G. B. Gregory* soon afterwards sailed with the cargo for *Algiers* in the *Irvine*.

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Walsh continued to pay the bills so accepted by him, on account of the goods shipped on board the *Irvine*, down to the month of *December*, 1811, when he became bankrupt, at which time there was a balance exceeding 1000*l.* due from *Gregory* and *Hipkins* to *Walsh*, which balance has not since been reduced:

On the 24th *June*, 1812, while *Gregory* was abroad, *John Thomas Taylor* and *John Parker*, as assignees of *Walsh*, commenced an action by special original, in the Court of King's Bench, against *Hipkins* and *Gregory*, for the recovery of a debt then claimed to be due and owing from *Hipkins* and *Gregory* to the estate of *Walsh*, and for that purpose sued out a writ of special *capias*, directed to the sheriffs of *London*, returnable on the morrow of *All Souls* in *Michaelmas* term, 1812, and indorsed for bail for the sum of 1000*l.* and upwards.

Hipkins being, at the time of suing out the said writ, a prisoner in the King's Bench prison, was detained in custody at the suit of the assignees of *Walsh* for the debt of 1000*l.*; and a commission of bankrupt was, on or about the 18th *August*, 1812, upon the petition of the said *J. T. Taylor*, and his then copartner, *John Taylor*, awarded and issued against *Hipkins*, as the copartner in trade of *Gregory*, upon which commission he was duly adjudged a bankrupt.

At a meeting under the commission, held at *Guild Hall*, *London*, on the 5th *September*, 1812, *J. T. Taylor* was duly chosen sole assignee of the estate and effects of *Hipkins*, and an assignment of such estate and effects was executed to *J. T. Taylor*, by the major part of the commissioners named in the commission.

Hikpins died in *September*, 1813; in *November*, 1812, *Gregory* being then abroad, an *alias* writ of special *capias* was sued out against *Hipkins* and *Gregory* at the suit of the assignees of *Walsh*, directed to the sheriffs of *London*, returnable in fifteen days of *St. Martin*,

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tin, in *Michaelmas* term, 1812; and on the 11th of the following *December*, a *pluries* writ of special *capias* was sued out by the assignees of *Walsh*, against *Hipkins* and *Gregory*, also directed to the sheriffs of *London*, and returnable in eight days of *St. Hilary*, in *Hilary* term, 1813, and both the last mentioned writs were also indorsed for bail for 1000*l.* All the said writs of *capias alias* and *pluries* were lodged at the secondaries or sheriffs' office for *London*, between the beginning of *Michaelmas* term, 1812, and the end of *Hilary* term, 1813, and were severally duly returned *non inventi* by the then sheriffs before the end of *Hilary* term, 1813.

The action was so commenced by special original in the Court of King's Bench, and such several writs of *capias alias* and *pluries* were sued out thereon, with a view to outlaw *Gregory*; but no outlawry ever took place, the completion of such intended outlawry being subsequently suspended by reason of the commission having been awarded and issued against *Hipkins*, as before mentioned.

At the trial of the action hereafter mentioned in *Trinity* term, 1821, such evidence of the return of *Gregory* to *England*, in *April* 1814, was given as is hereinafter mentioned, and *Gregory* afterwards returned to *England* in *July* 1819.

The assignees of *Walsh*, on the 15th *February*, 1821, commenced a new action in the Court of King's Bench against *Gregory*, as the surviving partner of *Hipkins*, and sued out a bill of *Middlesex* against him, returnable on *Wednesday* next after fifteen days of *Easter*, in *Easter* term, 1821; which bill of *Middlesex* was indorsed for bail for 1336*l.* 6*s.* 10*d.*, being the same identical debt, with an accumulation of interest thereon, as that for which the former action was brought against *Hipkins* and *Gregory* jointly.

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A warrant on the said bill of *Middlesex* was made out and delivered to an officer of the sheriff of *Middlesex*, for the purpose of executing the same, and such officer went with it to the house or residence of *Gregory* in order to arrest him, and made several attempts to effect it, which having failed, the assignees of *Walsh*, (the plaintiffs in that action,) on the 17th *March*, 1821, proceeded to strike a docket, and on the 23d of the said month issued a commission of bankrupt against *Gregory*, and he was thereupon adjudged and declared a bankrupt. *Aaron Hurrill* was duly chosen sole assignee of the estate and effects of *Gregory* at the second meeting of the commissioners held at *Guildhall* on the 21st of *April*, 1821. *Gregory* having opposed the commission, did, on the 12th of *April*, 1821, prefer his petition to the Lord Chancellor, thereby praying that the same might be superseded; and by an order of his honour the Vice-chancellor, made on hearing the petition, on the 9th of *May*, 1821, it was ordered that *Gregory* should be at liberty to bring and prosecute an action of trover against the assignee of his estate and effects, who, on the trial, was to admit possession of goods of the value of 5*l.* in order to sustain the action, and the petitioning creditors under the commission were to defend the action in the name of the assignee, upon their indemnifying the assignee; and the same was to be tried in the Court of Common Pleas in *London*; and it was ordered, that all proceedings under the commission should be stayed until further order. *Gregory*, in pursuance of, and in obedience to the order, did, on the 17th of *May*, 1821, commence an action of trover against *Hurrill*, his assignee, in the Court of Common Pleas.

On the 19th of *May*, 1821, two days after the commencement of the action of trover to try the validity of the commission, the attorneys for the petitioning creditors under the commission issued against *Gregory*, fetched

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away from the secondaries or sheriffs' office for *London*, the three several writs of *alias capias* and *pluries* sued out against *Hipkins* and *Gregory* in 1812, with the returns indorsed on the said three writs, and gave the following receipt: "*Taylor and Another* v. *Hipkins* received the *capias alias* and *pluries* writs in this cause, 19th *May*, 1821. *Thomas Binns* for *Stevenson* and *Bicknell, Lincoln's Inn*."

The three writs were all filed together in the record office of the Court of King's Bench, on the 11th of *July*, 1821, being the last day of *Trinity* term in that year, and a roll of the proceedings, with continuances on the writ of *pluries* brought down to the term next preceding the date of the commission issued against *Gregory*, was docketed and carried in on the same day the three writs were filed of record, which, in point of fact, was the day next before the day appointed for the trial of the action of trover, and only two days before such trial actually took place.

The action of trover came on for trial before the Lord Chief Justice of the Common Pleas and a special jury at *Guildhall*, on the 13th of *July*, 1821, when *J. T. Taylor* and *Parker*, as petitioning creditors, proved the trading and act of bankruptcy of *Gregory*, and when they also established, by the production of certain documents and the testimony of *Walsh*, a debt of 1477*l.* 11*s.* 6*d.* due to them as assignees, for and on account of the several advances made by *Walsh*; whereupon *Gregory* adduced as evidence *Samuel Hatch*, the clerk of Mr. *Iggulden* the vice-consul of *Sweden*, resident at *Deal*, who identified *Gregory* as being a person who, in *April*, 1814, had called at the office of the vice-consul at *Deal* several times whilst waiting for a passage in the ship *Hazard*, (which came into the *Downs* from *St. Ubes*, bound to *Dort*) (*a*); that he left a letter with

(*a*) Ascertained on enquiry by the Court.

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the witness to be delivered to the captain of a ship called the *Aurora*, and that *Gregory* waited there several days. The letter was given in evidence at the trial, and was as follows.

"*Downs*, 21st *April*, 1814.

"Capt. *M. F. Bohl*,

"You will proceed from hence with all dispatch, for the port of *Amsterdam*, with your cargo, waiting my further orders in regard of the same.

"Your obedient servant,

"*G. B. Gregory.*"

"P. S. As all privateers are called in there is no occasion for convoy."

Addressed, "Capt. *M. F. Bohl*, *Swedish* schooner, *Aurora*, care of *E. Iggulden*, Esq., *Deal*; expected in the *Downs* hourly from *Portsmouth*."

The testimony of *Hatch* was the only evidence offered by the bankrupt of his having been in *England* from the year 1811 till the year 1819, whereupon *J. T. Taylor* and *Parker*, the assignees of *Walsh*, produced one *Martha Salter* as a witness, who stated, that she knew *Gregory* in *Sweden*, in 1815, and that she had seen him in *England*, at the house of Mr. *Patrick*, in 1819, when he said that he had sailed from *England* in 1811, and returned in 1819, and that she had also heard him say, in the presence of his sisters, that he had never been in *England* during the whole seven years, and that she thought she had heard him say so more than once; and the assignees of *Walsh* also put in evidence at the trial, examined office copies of the aforesaid writs of *capias alias* and *pluries*, and returns indorsed thereon, and also an examined office copy of the roll of the proceedings, with the continuances entered thereon as aforesaid.

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The Lord Chief Justice thereupon directed the jury to find a verdict for the plaintiff *Gregory*, reserving the point for the consideration of the Court as to the effect of the continuances so as aforesaid entered on the roll, and whether the same were sufficient to take the case out of the statute of limitations.

Within the four first days of the ensuing *Michaelmas* term, 1821, a rule *nisi* was obtained in the Court of Common Pleas, on behalf of the assignees of *Walsh*, that a nonsuit might be entered, or a verdict for the Defendant, upon the following grounds, *viz.* that the account between *Walsh* and *Hipkins* and *Gregory* came within the exception contained in the third section of the 21 *Jac.* 1. *c.* 16.: that the return of *Gregory* to this country in 1814, for the period and under the circumstances before stated, was not such a return to *England*, within the meaning of the statute of limitations, as that the six years thereupon began to run against the said debt; and that the suing out the aforesaid writs of *capias alias* and *pluries*, with the returns thereon, and the subsequent continuances, took the debt out of the statute.

After the granting of such rule, *Gregory*, in the same term, obtained a rule *nisi* from the Court of King's Bench, to set aside the return to the writ of special *capias*, and the subsequent proceedings thereon, for irregularity, with costs; and when the same came on for argument, the Court referred it to the Master to determine whether such proceedings had been regular, according to the practice of that court; and the Master afterwards reported, that, according to the practice of the Court of King's Bench, established for many years, the proceedings had been regular, and were sufficient to save the statute of limitations, whereupon the rule *nisi* obtained by *Gregory* was discharged with costs.

In *Hilary* term, 1822, the rule *nisi* obtained by *J. T. Taylor* and *Parker*, the assignees of *Walsh*, for setting aside

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aside the verdict found for *Gregory*, came on to be argued, when the same was made absolute, and a verdict ordered to be entered for the Defendant.

On the 19th of *February*, 1822, *Gregory* preferred another petition to the Lord Chancellor, thereby praying that the commission of bankrupt so issued against him might be superseded, on the ground that the petitioning creditors had not, at the time of issuing the said commission, a good legal debt to support the said commission; but that the debt (if any) had been barred by the statute of limitations.

The petition came on to be heard before his Lordship on the 17th of *August*, 1822, when his Lordship was pleased to order that this case should be stated for the opinion of the Court of Common Pleas, in which the question should be, "Whether, under the circumstances stated, *J. T. Taylor* and *Parker*, as assignees of the estate and effects of *Walsh*, had, at the time of suing out the commission of bankruptcy against *Gregory*, *viz.* on the 22d of *March*, 1821, a valid debt as petitioning creditors to support the commission?" And it was ordered, that the Lord Chief Justice of the said court should be at liberty, if he should think proper so to do, upon the argument of the said case, to use his notes of former proceedings had before him in this matter. (*a*)

The case came on to be argued in *Easter* term last.

Taddy Serjt. for the Plaintiff. At the time of suing out this commission there was no petitioning creditor's debt.

(*a*) The parties and facts in this cause are the same as those with respect to which a decision was pronounced by this court in *Hilary* term, 1822. But the Lord Chancellor thought the matters of sufficient importance to undergo a second consideration, and accordingly directed them to be stated as in this case.

The following correction ought to be made in the argument of the former report, 3 *B & B.* 213. Line 4. from the top, for *another*, read *an*. Line 5. erase *and in another court*. Line 6. for *an action in this court*, read *a commission of bankrupt*.

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debt. A debt barred by the statute of limitations is not a debt on which a commission of bankrupt can be supported; *ex parte Dewdney* (a); and this debt was barred by the statute. It was barred by the express words of the statute (b), unless affected by the exceptions respecting merchants' accounts, and parties beyond the seas, or by the circumstance of continuances having, after the commission was sued out, been entered up in the action brought in the King's Bench for the recovery of this debt. By none of these matters was the debt affected: not by the exception in favour of merchants' accounts, because it has been holden that exception does not apply, in cases where six years have elapsed without any new item being added to the account. *Foster* v. *Hodgson* (a), *Barber* v. *Barber*. (b) Not by the exception respecting parties beyond seas, because *Gregory* was at *Deal* in 1814, more than six years before the commis-

(a) 15 *Ves. jun.* 479.

(b) 21 *Jac.* 1. *c.* 18. *s.* 3. "All actions of *trespass quare clausum fregit, etc. detinue, trover*, and *replevin*, for taking away goods or cattle; all actions of *account*, and upon the *case*, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; all actions of *debt*, grounded upon any lending, or contract without specialty, or for arrearages of rent; and all actions of *assault, menace, battery, wounding*, and *imprisonment*, shall be commenced and sued within the times hereafter expressed, and not after; that is to say, the said actions upon the *case* (other than for *slander*), *account, trespass quare clausum fregit, etc., debt, detinue*, and *replevin*, within six years next after the cause of such actions or suit, and not after; actions of *assault, battery, wounding*, or *imprisonment*, within *four* years; and actions upon the *case* for *words*, within *two* years next after the words spoken, and not after." "And if any person or persons entitled to any of the said actions, shall be, at the time of any such cause of action accrued, within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned or beyond the seas, then such person or persons shall be at liberty to bring the same actions, within such times before limited, after their coming to or being of full age, discovert, of sane memory, at large, and returned from beyond the seas."

(c) 19 *Ves. jun.* 185.

(d) 18 *Ves. jun.* 286.

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mission was sued out; and it has been expressly holden, that when the time prescribed by the statute once begins to run, nothing arrests its course. *Smith* v. *Hill.* (a) It may, indeed, be urged, that the mere landing at *Deal* was not such a return as is contemplated by the statute; but the words of the statute are general, and it would be difficult, if not impossible, to draw a line between such acts as might or might not be deemed a return. [*Dallas* C. J. Suppose a party were driven into port by stress of weather; could that be deemed a return?] The present case does not go so far as that, for *Gregory* waited several days for a passage. However, the question ought always to be, whether or no the party was actually in *England*; because, if he landed but for a moment, he would be liable to be served with process. [*Dallas* C. J. According to my note of what passed at the trial, he came on shore while the ship was lying off *Deal*, to put a letter in the post; can this be a returning within the statute?] The principal point in dispute is the effect of entering the continuances in the action in the Court of King's Bench. Now, in order to support a commission of bankrupt, the debt on which the commission is sued out, ought to be one which the party suing out the commission could avail himself of at the very time of suing out the commission, and this the Defendant might have been in a condition to do, if he had entered up these continuances *before* he sued out the commission; but he never entered them up till *afterwards*. So that at the precise time when the commission was sued out, the continuances not having been entered up, he had no means of compelling the payment of this debt. Then, in every replication to a plea of the statute of limitations, it is usual to allege that a writ was sued out with intent the intent to prosecute an

(a) 1 *Wils.* 134.

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action for the debt; but the intent of suing out the writ in the present instance was merely to outlaw *Gregory*: and again, in order to avoid the operation of the statute of limitations, the proceedings relied on, as having that effect, must be such as may be connected with the proceedings in which the validity of the debt is disputed: those proceedings must in effect be a continuance of the same course to substantiate the same demand; but proceedings differing in their nature cannot be so connected; an attachment of privilege has been holden not to be a continuance of a bill of *Middlesex*, so as to avoid the operation of the statute: *Smith* v. *Bower* (*a*): So in *Brown* v. *Babington* (*b*), an action of *assumpsit* was holden to be no continuance of a trespass *qu. cl. Fr.*: and it is impossible that a commission of bankrupt can be connected with or deemed a continuance of an action at law. But supposing even that it could be so connected, such a commission is in the nature both of a judgment and execution, and if so, the continuances, in the present instance, were entered too late; for though continuances may in some cases be entered after verdict, there is no instance of their having been entered after judgment.

Bosanquet Serjt., *contrà*. From all the circumstances attending the transaction, it is clear that the debt on which this commission is grounded, was an item of merchants' accounts; and though a court of equity may refuse to grant relief where no accounts have passed between the parties within the space of six years, yet, with a view to claims in a court of law, the statute of limitations can in no way affect an item of merchants' accounts. (*c*) The Plaintiff, too, never returned to

(*a*) 3 *T. R.* 662.
(*b*) 2 *Ld. Raym.* 880.
(*c*) *Per Lord Kenyon* in *Catling* v. *Skoulding*, 6 *T. R.* 189. See also Serjt. *Williams's Note* to *Webber* v. *Tivill*, 2 *Saund.* 127.

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England, within the meaning of the statute, till the year 1819. In order to entitle a debtor to the protection of the statute from the date of his return, that return ought to be such as would put it in the power of a creditor to enforce a claim against him. With a view to such a purpose the Plaintiff's return in 1814 amounted to no more than if his ship had run aground and floated away at the next tide. An appeal to the next sessions, has been holden to mean an appeal to the next sessions at which the appellant could possibly state his case; and a return to bar a creditor must be such as that creditor might have taken advantage of. But at all events the continuances entered in the action in the Court of King's Bench are sufficient to render the debt due from the Plaintiff a good petitioning creditor's debt. At the time of suing out the commission that debt was one of which the Defendant could instantly have availed himself at law. It is true, he had not at that time actually entered the continuances, but he had a right to do so, and the entering them up was a mere matter of form which might be done at any time, (*Bates* v. *Jenkinson* (*a*): even after error, (*Sir W. Wynn* v. *Middleton* (*b*): Irregularity in the process will not prevent its effect of excluding the operation of the statute; and an informal attachment of privilege has been holden a sufficient commencement of a suit for this purpose. But the regularity of the continuances in the present case has been established, by the decisions in *Beardmore* v. *Rattenbury* (*c*) and *Taylor* v. *Hipkins*. (*d*) It was sufficient, then, if the party had the means of enforcing payment of the debt; it was not necessary he should actually have employed those means at the time of suing out the com-

(*a*) 6 *T. R.* 618., *per* Lord *Mansfield*.

(*b*) 2 *Str.* 1227.

(*c*) 5 *B.* & *A.* 452.

(*d*) Id. 489.

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commission. When a record is pleaded, or an action brought on a judgment, there is frequently no record existing at the time: it is sufficient if the record is produced at the trial. As to the circumstance of the writ having been sued out for the purpose of outlawry, it was not on that account the less a writ for the recovery of the debt, and *Gregory* might have been declared against, if he had come in and appeared; the foundation of the action was laid, and there was in truth no other mode of proceeding.

Taddy, in reply, observed, that the language used by Lord *Kenyon* in *Catling* v. *Skoulding*, touching merchants' accounts, was extra-judicial, and not necessary to the decision of that case. He then cited *Rex* v. *Justices of Staffordshire* (a); and from the principle of that decision argued, that, in order to the operation of the statute of limitations, it was not necessary the return of a debtor from beyond seas should be such a return as would insure the creditor notice thereof.

In the vacation after *Trinity* term, the Court certified that the petitioning creditor's debt was, at the time of the issuing the commission of bankrupt against *Gregory*, a valid legal debt, sufficient to support the commission, and was not barred by the statute of limitations.

(a) 3 *East*, 151.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Michaelmas Term (a),

In the Fourth Year of the Reign of GEORGE IV.

1823.

MEMORANDUM.

Chief Baron *Richards* died on the 11th of *November* in this term.

(a) *Richardson* J. was prevented, by illness, from taking his seat in court during the whole of this term; and *Dallas* C. J. after the 13th of *November*.

Nov. 6.

BERRY *v.* FERNANDES.

In C. B. an affidavit of debt for money paid for a Defendant, and advanced to him, need not state that the payment and advance were at Defendant's request.

THE Defendant had been holden to bail on an affidavit, that he was indebted to the Plaintiff in *l.*, for money paid by the Plaintiff for the Defendant, and money advanced to him; but there was no allegation that this was at the request of the Defendant. On the ground that the affidavit was insufficient by reason of this omission,

Pell Serjt. moved for a rule *nisi* to discharge the Defendant on common bail. He admitted that in *Bliss* v. *Atkins* (*a*) and *Eyre* v. *Hulton* (*b*) such an affidavit had been deemed sufficient in this court; but in support of his application he relied on *Durnford* v. *Messiter* (*c*), a late decision in the Court of King's Bench, in which it was holden that the allegation of a request was essential in such an affidavit; and he argued the convenience of assimilating the practice of the two courts.

PARK J. (*d*) I am of opinion the affidavit is sufficient. It is true the latest decision on the subject is in opposition to *Eyre* v. *Hulton*; but the matter was gravely considered in that case, and a request with respect to money paid on behalf of a defendant, is in general an inference of law, which an uninstructed person cannot be expected to swear to.

BURROUGH J. This is a mercantile transaction, in which it is impossible to expect the strictest degree of legal precision.

Rule refused.

(*a*) 5 *Taunt.* 756.
(*b*) 5 *Taunt.* 704.
(*c*) 5 *M.* & *S.* 446.
(*d*) *Dallas* C. J. was absent.

THOMAS THURTELL *v.* BEAUMONT.

Nov. 10.

ASSUMPSIT against the managing director of an insurance company to recover the value of goods alleged to have been destroyed by fire in the Plaintiff's warehouse.

1. In an action against an insurance company to recover a loss by fire, the defence being that the Plaintiff himself had wilfully set fire to the premises, the Judge directed the jury, that in order to their finding a verdict against the Plaintiff, they ought to be satisfied that the crime imputed to him was as fully proved as would justify them in finding him guilty on a criminal charge for the same offence: Held, that this direction was right.

2. In the same cause the Court refused to grant a rule *nisi* for a new trial on the ground that subsequently to a verdict for the Plaintiff, the grand jury had found a bill against him and others for a conspiracy to defraud the insurance company in this very matter.

3. But on affidavits disclosing the conspiracy itself, and shewing that the Defendant did not attain a knowledge of it till after the trial, so that the Plaintiff's case was in effect a surprise on him, the Court granted a rule *nisi* for a new trial, on payment of costs.

At the trial before *Park* J. at the *London* sittings after last term, the defence set up was, that the Plaintiff had wilfully set fire to the premises, or had caused them to be set fire to. Positive testimony was adduced, and inconsistencies were pointed out in the Plaintiff's evidence tending to substantiate this charge. The learned Judge directed the jury, that before they gave a verdict against the Plaintiff, it was their duty to be satisfied that the crime of wilfully setting fire to the premises was as clearly brought home to him in this action as would warrant their finding him guilty of the capital offence, if he had been tried before them on a criminal charge.

The jury found a verdict for the Plaintiff in the sum of 1913*l.*, the value of the goods which *John Thurtell*, a brother of the Plaintiff, swore were on the premises at the time of the fire.

Taddy Serjt. now moved for a new trial, on the ground, first, that the jury had been misdirected. He urged, that in order to discharge the Defendant from

 liability,

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liability, it was not necessary the jury should entertain the same certainty with respect to the Plaintiff's guilt as would justify them in convicting him on a criminal charge. In this case, as in any other, they would, without reference to the defence set up, be warranted in finding against the Plaintiff if he failed to make out his case to their entire satisfaction; and that might happen in various ways, even though arson were never proved against him. For instance, if the loss had been occasioned by negligence only, unaccompanied with guilt, the Defendant would have been entitled to a verdict.

But the Court were clearly of opinion that the direction was proper, and refused to grant a rule on this ground.

Another ground taken in support of the motion was, an affidavit from the Defendant, that the grand jury of *Middlesex* had found true bills against *John* and *Thomas Thurtell* and others, for a conspiracy to defraud the fire office in this very matter.

PARK J. On this point I have looked into the books; I find many applications for new trials, on the ground of bills found by the grand jury, but none in which the application has succeeded. In one case, where the ground of the motion was, that a bill for perjury had been found against the principal witnesses, Lord *Mansfield* said, that the granting the rule for such a reason would have a most dangerous tendency, as it would open a door for constant scenes of perjury, and tempt a party to delay execution by indicting his adversary's witnesses. In *Warwick* v. *Bruce* (a), Lord *Ellenborough* discharged, with costs, a rule to stay execution till after the trial of an indictment against the

(a) 4 *M. & S.* 140.

Plaintiff's

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Plaintiff's witnesses for perjury: and in *Bartlett* v. *Pickersgill* (a), in Lord *Henley's* time, a plaintiff having petitioned for leave to file a supplemental bill, because the Defendant had, on the evidence of the Plaintiff, been indicted and convicted for perjury on his answer to the original bill, Lord *Henley* dismissed the petition.

DALLAS C. J. referred to *Attorney-General* v. *Woodhead* (b), and

The rule prayed by *Taddy* was refused on this ground also.

Taddy, however, having produced affidavits from a respectable warehouse-man, and from *Joseph Hunt*, (who, together with *John Thurtell*, was a prisoner in *Hertford* gaol, on a charge of murder,) shewing that the Plaintiff's demand had been supported by a tissue of unparalleled and audacious fraud, the circumstances attending which, although he vehemently suspected them, the Defendant had no means of unravelling till after the trial, so that with regard to the Plaintiff's case, he was in effect taken by surprise,

The court, on this ground, granted a rule *nisi* for a new trial, upon payment of costs.

Rule *nisi* accordingly.

(a) 4 *East*. 577. *n*. (b) 2 *Price*, 3.

SHERIFF *v.* JAMES.

Nov. 11.

An action on the case does not lie for detaining cattle distrained damage feasant where tender of sufficient amends was made after the cattle had been impounded.

THIS was an action on the case for detaining the Plaintiff's cattle in pound after tender of sufficient amends. The declaration, which contained many counts,

stated

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stated in substance, that the Defendant had distrained and impounded the plaintiff's cattle, *damage feasant*, in a close of the Defendant, and then went on to aver, that the Plaintiff, after the impounding and as soon as he had notice of it, tendered and offered to the Defendant, in satisfaction of the trespasses, a certain sum of money, to wit, the sum of 2*s.*, the same being then and there sufficient amends for the tresspasses, and for all matters for which the Defendant had a right to detain the cattle; and then and there requested the Defendant to deliver the said cattle to the Plaintiff; and that it was then and there the duty of the said Defendant to have accepted such amends as aforesaid, and to have delivered the said cattle to the Plaintiff; yet the defendant, not regarding his duty, but contriving to aggrieve the Plaintiff, refused to deliver the said cattle to the Plaintiff, and wrongfully and maliciously demanded an excessive sum, by way of amends for the trespasses, to wit, the sum of 10*s.* 6*d.*, and extortionately detained the cattle for the said trespasses, &c. At the trial before *Hullock* B., at last *Monmouth* assizes, the Plaintiff was nonsuited, the learned Baron being of opinion that this action did not lie.

Peake Serjt. now moved for a rule *nisi* to set aside this nonsuit and enter a verdict for the Plaintiff, on the ground, that if this action did not lie, the Plaintiff would be without a remedy, as he could not succeed in replevin where the tender was made after the cattle had been impounded. The same point was raised in *Anscomb* v. *Shore* (*a*); but that case was ultimately decided on another ground.

(*a*) 1 *Campb.* 285., where it was holden such an action would not lie, and where is indicated, the course which a complainant may pursue.

PARK

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PARK J. Where the alleged grievance is one which, like the present, must have occurred frequently, the circumstance, that an action is of the first impression, affords a strong presumption against it. The Court are of opinion that the rule prayed for ought not to be granted. Such an action has never been permitted to succeed, and the *dicta* in the books are all against it.

BURROUGH J. This is probably the invention of some young pleader, and never was thought of before.

DALLAS C. J., concurring, the

Rule was refused.

PALMER, Demandant; MEREDITH, Tenant; EDDINGTONS, Vouchees.

Nov. 11.

Recovery. Amendment of warrant of attorney.

IN the warrant of attorney in this recovery, instead of the usual words "to gain or lose in a plea of *land*," there had been used by mistake the words "in a plea of *trespass*." *Heywood* Serjt. this day obtained leave to amend the warrant of attorney, by inserting *land* instead of *trespass*.

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Nov. 11.

RICHARDSON *v.* BROWN.

Warranty. "To be sold, a black gelding, five years old; has been constantly driven in the plough.—Warranted:" Held, that the warranty applied to soundness only.

THE Plaintiff sued to recover the price of a horse, sold under the following warranty "To be sold, a black gelding, five years old; has been constantly driven in the plough.—Warranted."

At the trial before *Park* J., at *Guildhall*, at the sitting after *Trinity* term, 1823, the Plaintiff having proved that the horse was sound, obtained a verdict for the price agreed upon.

Pell Serjt. now moved to set aside the verdict, and enter a nonsuit, on the ground that the warranty referred to the horse's having constantly been driven in the plough, and that the Plaintiff ought to have proved that circumstance.

But the Court thought the warranty applied only to soundness, although a little ambiguity might be occasioned by the structure of the sentence, and they refused the rule.

Nov. 12.

LUDEN *v.* JUSTICE.

In an action against a feme covert, the Court would not, upon a summary appplication, cancel the bail-bond, and permit Defendant to file a common appearance, where much of the debt sued for was contracted before the Defendant disclosed her coverture, where she acted with great duplicity in eluding payment, and, at the time of the application, was residing out of the jurisdiction of the court.

PELL Serjt. obtained a rule *nisi* to cancel the bail-bond in this cause, and permit the Defendant to file a common appearance, upon an affidavit that she was a

married

married woman, that the Plaintiff knew this, and that her husband had died since the arrest. He cited *Waters* v. *Smith*. (*a*)

Cross Serjt., in opposition to the motion read an affidavit from the Plaintiff, stating, that before he ascertained the Defendant to be a married woman, she had become greatly indebted to him for the board and education of a child placed at his school by the Defendant, and called by her *Eliza Ballantyne*. Circumstances were then disclosed, shewing that she had acted with the greatest duplicity in eluding the payment of this debt, and was now residing in *Scotland* out of the jurisdiction of the court.

Cross cited, *De Gaillon* v. *L'Aigle* (*b*) and *Burfield* v. *Duchess De Pienne* (*c*), to shew, that, under such circumstances, the Court would not assist the Defendant upon a summary application, but would leave her to plead her coverture. These cases were subsequent to *Marshall* v. *Rutton* (*d*); and in *Waters* v. *Smith* the Court said they would not interfere where imposition was practised.

Pell relied on the circumstance of the Plaintiff's knowing the defendant to be married at the time of the arrest, and on the rule laid down in *Marshall* v. *Rutton*.

PARK J. This is an application to the discretion of the Court, and we must decide on all the circumstances of such a case, as it appears before the Court. In the present we think the Defendant ought to be left to plead her coverture. The case of *De Gaillon* v. *L'Aigle*

(*a*) 6 *T. R.* 451.
(*b*) 1 *B. & P.* 8.
(*c*) 2 *N. R.* 380.
(*d*) 8 *T. R.* 545.

was

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was much stronger than the present; there, the husband had given his wife a power of attorney to transact his business, and himself went abroad. But, the Court said they would not discharge the Defendant, though the Plaintiff was acquainted with the fact of her coverture: and upon reference to *Waters* v. *Smith*, it appears the Court said in that case, that where a married woman imposed upon a trader, and contracted on her own credit, they would not relieve her in a summary way.

In *Pritchett* v. *Cross* (*a*) *Gould* J. seemed to disapprove of the summary proceeding by motion, and of taking the fact of coverture from the Defendant's affidavit, and mentioned the case of Mrs. *Baddely* (*b*), where the Court were not satisfied with an affidavit, but put her to plead her coverture; and he said that he had always understood that such was the course both in K. B. and C. P.

In *Burfield* v. *Duchess de Pienne*, the Defendant had never represented herself as a single woman; and *Heath* J. said, "In *Deerly* v. *The Duchess of Mazarine* (*c*), where a verdict was found against the duchess, the court refused to relieve her, though her coverture was clearly proved; and if there be any case in modern times more recognised than another it is that case." We ought not to interfere in favour of the present Defendant, and I rely much on the circumstance of her living out of the jurisdiction of the Court.

DALLAS C. J. and BURROUGH J. concurring the rule was

Discharged.

(*a*) 2 *H. B.* 18. (*b*) 2 *Bl.* 1079. (*c*) 2 *Salk.* 646.

SWANNELL v. ELLIS and Another.

Nov. 12.

Declaration, that Plaintiff had employed Defendants to conduct an action of ejectment for the recovery of premises forfeited to the Plaintiff by the tenant's neglect of his covenant to repair, that when the cause came on for trial, it was referred to an arbitrator, who was to decide what repairs should be done, the costs of the action to abide the event; that the arbitrator was ready to proceed, but Defendants neglected to attend him, whereby Plaintiff was obliged to pay Defendants 60*l.* for his costs incurred in the action of ejectment, which otherwise the tenant would have been obliged to pay, and sold the premises for much less, to wit, 100*l.* less than he would otherwise have done. Verdict for Plaintiff, damages 160*l.*

Held, on motion for a new trial,—1. That it was not necessary in the action against Defendants to produce the lease on which the ejectment was brought. 2. That the jury were not confined to 100*l.* as the damages for loss on the sale of the premises; and, 3. That the declaration was not bad in arrest of judgment.

CASE, against the Defendants, for neglect in the conduct of Plaintiff's business.

The declaration stated that the Plaintiff had employed the Defendants to conduct an action of ejectment against a tenant of the Plaintiff, one *Chettle*, for the recovery of premises in the occupation of *Chettle*, which Plaintiff claimed on account of the same being out of repair, contrary to a covenant entered into by *Chettle* with the Plaintiff. That afterwards, at a sitting of *Nisi Prius*, it was ordered, that the cause should be referred to the arbitration of a surveyor, who was to decide what repairs should be done to the premises, and the costs of the action were to abide the event. That the surveyor was afterwards ready to proceed on the reference, but that the Defendants neglected to attend him; whereby the Plaintiff was obliged to pay the Defendants 60*l.*, for his own costs in the action of ejectment (which *Chettle* would otherwise have been obliged to pay) and sold the premises for much less, to wit, 100*l.* less than he would otherwise have done. At the trial before *Dallas* C. J., *Middlesex* sittings in this term, the Plaintiff obtained a verdict for 160*l.*, with leave for the Defendants to move to set it aside, and enter a nonsuit, on the ground that

the

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the lease containing the covenant from *Chettle* to *Swannell* was not produced at the trial.

Onslow Serjt. now moved accordingly, contending that this lease was the very foundation of the action, and if it had been produced, it might have appeared that no forfeiture had been incurred. The arbitrator himself could only ascertain by inspecting the deed what repairs *Chettle* was bound to perform. Then the jury have given 160*l.* damages, when, on the declaration, it appears the Plaintiff was entitled to no more than 100*l.*; for the 60*l.* costs he would have been obliged to pay to the Defendants even though they had been guilty of negligence, (*Templer* v. *M'Lachlan*) (*a*); and he has himself limited his damages on the sale of the premises, to 100*l.* But in arrest of judgment the declaration is clearly bad: inasmuch as it is no where shewn that the surveyor would have found any repairs to be necessary, or have awarded in favour of the plaintiff, even if the reference had been proceeded in. For aught that appears the award might have terminated in favour of *Chettle*, and the Plaintiff might have been obliged to pay all costs.

PARK J. I think there is no ground for allowing a nonsuit to be entered in this case, nor for attaching any weight to the objections which have been made against this declaration. The matter was referred to the surveyor, to say what repairs ought to be done by *Chettle*, and the surveyor was prevented from ascertaining this by the negligence of the Defendants; every occupier is bound to keep his premises in tenantable repair, and whether premises are in such repair or no, an arbitrator is competent to decide, on seeing them. As to the claim

(*a*) 2 *N. R.* 136.

for

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for a reduction of damages, the loss which the Plaintiff is said to have sustained on the sale of his house is specified under a *scilicet*, and the jury were not tied down to the precise sum so stated. There is no weight in the objection made to the declaration in arrest of judgment.

BURROUGH J. The declaration is perfectly good on the face of the record; the arbitrator was competent to decide what repairs ought to have been done, but he was prevented by the negligence of the Defendants; and, therefore, the verdict which has been obtained cannot be set aside.

Rule refused.

SCHOLEY v. GOODMAN.

Nov. 13.

Where, in an action by a trustee (under a separation-agreement) against a husband for the arrears of a weekly sum he had agreed to allow his wife, the declarations of the wife were received in evidence to shew that during the time in respect of which the demand was made she was living in adultery, and the jury found for the Defendant, the Court granted a new trial.

ASSUMPSIT upon the breach of an agreement, by which, after reciting that unhappy differences had existed between the Defendant and his wife, it was agreed they should for the future live separate; and in consideration that the Defendant would pay the Plaintiff 12*s.* a week for the use of his wife, the Plaintiff undertook to save the Defendant harmless from all debts she might contract, and covenanted that she should never sue him in the ecclesiastical courts. The usual money counts were added. Plea, *non-assumpsit.*

At the trial before *Dallas* C. J., *Middlesex* sittings after last *Michaelmas* term, one of the grounds of defence was, that during the time in respect of which the

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demand was made the wife was living in adultery with *J. P.*; and in addition to other evidence adduced to prove this fact, a witness was called, who stated that she had heard the wife confess it. The admission of this evidence was opposed by the counsel for the Plaintiff, but it was ultimately received; and the jury, with a verdict for the Defendant, found also the fact of adultery.

In *Hilary* term last, *Pell* Serjt., on the ground that the expressions of the wife could not be given in evidence in favour of her husband, obtained a rule *nisi* to set aside this verdict and have a new trial.

Vaughan Serjt., who now shewed cause against the rule, having been requested by the Court to address himself to the point, whether any action was maintainable upon a separation-agreement like the present, argued that it was inconsistent with the whole principle and policy of the institution of marriage, and likely to be productive of nothing but immorality. In *Durant* v. *Titley* (a), such an agreement was holden to be invalid. [*Burrough* J. The agreement in that case was prospective.] The effect will be equally pernicious if such agreements be allowed in any shape: the knowledge that they may be entered into as occasion may serve will operate as mischievously as if a prospective agreement had actually been entered into. The Lord Chancellor has always been adverse to the principle of these separations; and in *Marshal* v. *Rutton* (b) Lord *Kenyon* distinctly points out the inconvenience and difficulty of considering husband and wife as different parties. But either way the Defendant is entitled to a verdict; for, if the separation-agreement is considered valid, the connection between husband and wife no

(a) 7 *Price*, 577.

(b) 8 *T.R.* 545.

longer

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longer subsists, and there is no reason for excluding the wife or her declarations as evidence for or against her husband. In *Hanson* v. *Parker* (*a*) the Court held, that where a trustee sues, the declarations of the *cestuique trust* may be admitted in evidence. With respect to the declarations of a wife when she is *cestuique trust*, there is no direct authority, but on principle they ought to be admitted, and if so, the adultery of the wife is a complete defence to this action. By stat. *Westm.* 2. *c.* 34., adultery is made to operate as a forfeiture of dower; and there is a large class of cases in which it has been holden, that after such an act the husband is no longer liable, even for necessaries. *Morris* v. *Martin* (*b*), *Mainwaring* v. *Sands*. (*c*)

Pell, in support of his rule, urged that a husband was *primâ facie* responsible for debts contracted by his wife, and whatever the policy of the law might be with respect to deeds securing to the wife a separate maintenance, an indemnity against any debts she might contract, must be a sufficient consideration for an agreement to pay a weekly sum to the party giving such indemnity; he cited *Nurse* v. *Craig* (*d*) to shew that the present action would lie; and argued that the policy of the general rule extended to excluding the wife's declarations, even when she was living separate.

The counsel were requested to bring these important points before the Court in the shape of a special case, in order to their undergoing a solemn discussion; but the indigence of the parties not allowing this expence to be incurred, the Court granted a new trial, expressly abstaining, however, from giving any opinion on the points which had been discussed.

(*a*) 1 *Wils.* 257.
(*b*) 1 *Str.* 647.
(*c*) 1 *Str.* 706.
(*d*) 2 *N. R.* 148.

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DALLAS C. J. said, On the subject of the wife's declaration I gave no opinion at the trial: under the circumstances of the present case it was treated as a new question; but my attention was called to the principle, that the declarations of the wife could not in any case be received in evidence for or against her husband. I thought at the moment the rule did not apply in cases where (if the law recognises agreements, such as that on which this action has been commenced,) the community of interest between the parties no longer exists; but I gave then, and give now, no decisive opinion.

PARK J. I think the case ought to go to a new trial. The cause embraces most weighty considerations which ought not to be decided upon in a motion such as the present.

BURROUGH J. abstained from expressing any opinion, but thought there ought to be a new trial.

Rule absolute.

It was also urged on the part of the plaintiff, that the adultery ought to have been pleaded, and *Field* v. *Serres* (*a*) was cited: to which it was answered, that *Field* v. *Serres* was an action of debt on bond; but that, in an action of *assumpsit* like the present, the fact might be given in evidence under the general issue; and in this opinion the Court seemed to acquiesce.

(*a*) 1 *N. R.* 121.

ROSE v. WILSON.

Nov. 13.

Plaintiff having entered a public-house after all the doors had been closed for the night, and having conducted himself with insolence, Defendant sent for a constable, and charging Plaintiff with a felony, he was detained in custody two days. Plaintiff having recovered in an action of trespass for this imprisonment, the Court refused to set aside the verdict and grant a new trial, holding, that Defendant was not justified in charging Plaintiff with a felony.

TRESPASS, for false imprisonment. Plea, that the Defendant was acting in aid of a constable employed to apprehend Plaintiff, who had improperly entered and made a disturbance in Defendant's house. At the trial, before *Bayley* J., *York Lent* assizes, 1823, it appeared on cross-examination of witnesses, produced by the Plaintiff, that he, having entered, after midnight, a public house, kept by the Defendant, at *Manchester*, and having obtruded himself upon a party who had engaged a separate room, was with difficulty prevailed on to withdraw and leave the house; but that he contrived to enter it again, at four o'clock in the morning, after all the doors had been closed, when, upon his demeaning himself with insolence, a constable was sent for, and the Defendant charging the Plaintiff with a felony, he was conducted to the *New Bailey* prison, where he remained all that day and part of the next.

The learned Judge holding that the Defendant had no pretence for charging the Plaintiff with a felony, no evidence was offered on the part of the Defendant, and a verdict was found for the Plaintiff: to set this aside, and have a new trial,

Cross Serjt. on a former day obtained a rule *nisi*, against which *Pell* Serjt. was to have shewn cause; but the Court called on *Cross* to support his rule: he contended that, under the circumstances of the case, the Defendant was justified in sending for a constable, which was a course more proper than that of committing a breach of the peace, and at once turning the Plaintiff out of the house. But

 The

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v.
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The Court thought that the Defendant was not justified in charging the Plaintiff with a felony, or in saying that he, the Defendant, was acting in aid of the constable.

Rule discharged.

Nov. 18.

CROFTS v. PICK.

An officer of the Court, who is appointed provisional assignee under the Insolvent Debtors' Act, must, by the assignment made to him, be taken to accept the property within the meaning of the eighteenth section of that act.

REPLEVIN. The Defendant avowed for rent-arrear, upon a demise of a certain house from Defendant to Plaintiff. Plea, first, *non tenuit*. Second, that after the demise the Defendant took the benefit of the Insolvent Debtors' Act, and his property, including the house in question, was conveyed to *Joseph Jeyes*, as his assignee. Replication, that *Jeyes* never accepted the Defendant's right and title in the said house; on which the rejoinder took issue.

At the trial before *Graham* B. at the last assizes for the county of *Surry*, *Jeyes*, an officer of the Insolvent Debtors' court, stated that he accepted the office of provisional assignee, and held the conveyance of the Defendant's property, but never knew of the property in question. The learned Judge directed the jury, that the assignee's keeping the conveyance by him was a sufficient acceptance; and a verdict was found for the Plaintiff, with liberty to the Defendant to move to set aside the verdict, and enter a nonsuit. Accordingly

Pell Serjt., in this term, moved for a rule to such effect, on the ground, that, under the Insolvent Debtors' Act, 53 *G.* 3. *c.* 102. *s.* 18., the insolvent's property is only vested in the persons to whom, by that act, it is directed to be conveyed and assigned, "in case such persons shall consent to accept the same," and that a

mere

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mere conveyance to the provisional assignee, without any act on his part in the disposition or management of the property, did not amount to an acceptance of the property. He cited *Copeland* v. *Stephens* (a), and *Hanson* v. *Stephenson* (b), where, by a general conveyance to assignees, the legal estate was holden not to be vested in them, unless by some act they manifested an assent to the conveyance.

The Court adjourned the cause to enquire of Mr. Baron *Graham* his opinion respecting the verdict; and now

PARK. J. said, The Court were clearly of opinion, that a public officer, who became provisional assignee, had no discretion allowed him; and as he could not refuse the assignment, must be deemed to have consented to accept the property.

Rule refused.

(a) 1 *B.* & *A.* 593. (b) *Id.* 303.

ALDRITT v. KETTRIDGE.

Nov. 14.

Declaration, that Defendant was indebted to Plaintiff as assignee of a bankrupt for goods sold by Plaintiff as assignee. Proof, that the goods were sold by a preceding assignee, whose appointment had been vacated: Held, no variance.

THE declaration stated, that the Defendant was indebted to the Plaintiff, as assignee of *R. R. Scarratt*, a bankrupt, for pigs and barley sold and delivered to the Defendant by the Plaintiff, as assignee as aforesaid.

At the trial, before *Best* J., *Stafford Lent* assizes, 1823, it appeared that the sale had, in fact, been

 made

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ALDRITT v. KETTRIDGE.

made by a former assignee, whose appointment the Lord Chancellor had vacated, and had directed an assignment to be made to the present Plaintiff, by the provisional assignee and the commissioners; which was done. The jury having found a verdict for the Plaintiff,

Taddy Serjt. in *Easter* term last obtained a rule *nisi* to set aside this verdict, and enter a verdict for the Defendant, on the ground of a variance between the contract described and the contract proved.

Vaughan Serjt. was now to have shewn cause, but the Court called upon *Taddy* to support his rule.

Taddy. The transaction ought to have been described according to the fact, that the Defendant was indebted to the plaintiff, upon a sale by the former assignee. This is not a mere matter of form, but may materially affect the rights of the parties, in the way of set-off and otherwise. *Ridout* v. *Brough*. (a) In ordinary cases, where the assignee of a bankrupt is Plaintiff, it is usual to have two sets of counts, one, upon promises to the bankrupt, and the other upon promises to the assignee.

PARK J. The Court has no doubt. It is clear the Chancellor has power to vacate one appointment and to order another. In the present instance the appointment of the first assignee was vacated, and the Plaintiff was appointed in his stead; and he then sues in the same way as all other assignees. If this had been an action for money had and received, no question could have arisen, and the principle which gives the Plaintiff his title applies equally to the case of goods sold.

(a) *Cowp.* 133.

BURROUGH J. This assignee is, in contemplation of law, assignee from the beginning, and we cannot interfere with the intermediate appointment which has been vacated. The sale, therefore, must be considered as a sale which the present assignee may, if he pleases, affirm.

Rule discharged.

LASCAR and LOISADA v. MORIOSEPH.

Nov. 14.

Affidavit to hold to bail.

THE affidavit to hold to bail stated the Defendant to be indebted for goods sold to him, omitting to add that they had been delivered.

Upon the authority of *Hopkins* v. *Vaughan* (a), the Court permitted the Defendant to cancel the bail-bond and file a common appearance.

Taddy Serjt. for the Defendant.

Vaughan Serjt. for the Plaintiffs.

(a) 12 *East*, 398.

DOE, on the Demise of Earl THANET and Others, v. GARTHAM, Clerk.

Nov. 14.

Held, that the visitors and feoffees of a school who had dismissed the schoolmaster for misconduct, could not maintain ejectment for the schoolhouse till they had determined the master's interest in a regular way, by summoning him to appear before them.

THE lessors of the Plaintiff were visitors and feoffees of a school at *Skipton*, of which the Defendant was the schoolmaster; and for misconduct in his office he

had

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Doe dem.
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had been dismissed by the lessors of the Plaintiff, who, in this ejectment, sought to recover possession of the schoolhouse and its appurtenances. They had omitted, however, to summon the Defendant before them previously to dismissal.

At the *York Lent* assizes, 1823, before *Bayley* J., a verdict was found for the Plaintiff, with leave for the Defendant to enter a nonsuit, if the Court should be of opinion that the Defendant ought to have been called before the visitors previous to their removing him from the school.

In *Easter* term last a rule *nisi* to this effect having been obtained by *Peake* Serjt.,

Vaughan Serjt. now shewed cause; And upon the Court intimating that on the authority of *Rex* v. *Dr. Gaskin* (a), the rule must be made absolute, *Vaughan* endeavoured to distinguish that case from the present; that, having been decided upon a return to a *mandamus*, and there being no premises, to which as in the present case the parties exercising their authority could make a legal title; and he cited *Baggs*'s case. (b)

But the Court were clear that the Defendant having a freehold interest in his office of schoolmaster, the lessors of the Plaintiff could not succeed in ejectment till they had determined that interest upon summons in the regular way.

Rule absolute.

(a) 8 *T. R.* 209. (b) 11 [illegible] 93

1823.

In the Matter of WELLS's Bail.

Nov. 15.

Excuse for non-attendance of bail: what sufficient.

ONE of the bail in this case not appearing, an affidavit was put in, that after he had consented to come, the Defendant, on the night before the time appointed for justifying, had been informed the bail was prevented from attending by an agreement which he had entered into with a partner, never to become bail; and time was prayed to find and substitute another person,

Lawes Serjt., for the Defendant, endeavouring to distinguish this from a case in which the Court had refused such indulgence, by shewing, that in that case no excuse had been offered, and urging the hardship of the Defendant's situation.

The Court, however, held that nothing but an unforeseen accident of a serious nature could be a sufficient excuse for non-attendance, and refused to allow time.

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Nov. 19.

NEAVE *v.* MOSS.

In 1784, a tenant for life, who had a power to lease for twenty-one years, leased for fifty-three years to Defendant, who, in 1813, (nine years after the death of tenant for life,) underlet to Plaintiff: ten years after the death of tenant for life, the remainder-man, after giving to Plaintiff and Defendant notice to quit, granted Plaintiff a new lease, and received the rent thereon for six years; at the end of which time Defendant, who had acquiesced in the transaction, during the interval, distrained on Plaintiff for six years' rent: Held, that after this acquiescence, Plaintiff might, in an action of replevin, plead *non tenuit* to Defendant's avowry under the lease which Plaintiff accepted from him in 1813.

BY a marriage settlement, of *October*, 1771, the *Tumble-down-Dick*, public-house, situated in *Borough High-street*, *Southwark*, was settled on *John Mootham* and his assigns for life, and after his decease on his intended wife and her assigns, for life, and after their deaths, on the children of the marriage (if two or more), in such shares as the husband and wife, during their joint lives, should appoint; and in default of such appointment on all the children, in equal shares, as tenants in common. There was a power for *Mootham*, during his life, and for his wife, if she should survive him, to lease the premises, for any term not exceeding *twenty-one years*. The settlement was duly executed, and the marriage took place.

These premises, in *November*, 1784, *John Mootham* leased to *John Darby*, from *Midsummer*, 1784, for fifty-three years and a half, at 40*l.* a-year rent.

John Mootham died in 1804. By several mesne assignments the term granted by *John Mootham* to *Darby*, became, in *June*, 1813, vested in *John Ellis Clowes* and *James Western*, in trust, to secure the payment of certain sums to certain persons named in the deed of trust; and upon payment of those sums, in trust, to assign the term to *John Newberry*.

John Newberry was at that time a partner in the firm of *Meux* and Co.; and upon payment of the sums specified in this last-mentioned deed, the term in question was assigned to *Meux* and Co., in *January*, 1821.

Meux

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MOSS.

Meux and Co., however, had the management of the property in 1813; and on the 26th of *November*, in that year, by an agreement in writing, let the *Tumble-down-Dick* to *Robert Neave*, at 70*l.* a-year, with a stipulation from *Neave*, that he would purchase his beer of *Meux* and Co., and would not part with possession of the house or premises to any person whomsoever, without the previous consent of *Meux* and Co. Between 1813 and 1821 *Neave* and his wife both died, and at the time of the distress for which the present replevin was brought, the Plaintiff (their daughter and executrix) carried on the business of the house.

Up to *Lady-day*, 1815, *Meux* and Co. continued to pay to Mrs. *Mootham* the 40*l.* a-year, on the term granted by *John Mootham* to *Darby*.

In *September*, 1814, Mrs. *Mootham* gave *Neave* notice to quit at the ensuing *Lady-day*, or at the end of his current year, and served also a like notice on *Meux* and Co.: and in *March*, 1815,

Mrs. *Mootham* demised the *Tumble-down-Dick* to *Neave* for twenty-one years, at 100*l.* a-year. This rent the *Neaves* paid to Mrs. *Mootham* and her assigns, from that time to the period of the present action; and after *Lady-day*, 1815, no rent was paid by *Meux* and Co., or any one else, in respect of the term of fifty-three years, granted by *John Mootham* to *Darby*, nor did *Meux* and Co., although they continued to supply the *Tumble-down-Dick* with beer, enforce any demand against the *Neaves* for rent,—accruing on the term granted in 1813 by *Meux* and Co. to *Neave*,—till *April*, 1821, when they distrained for 190*l.*, being the balance of six years and a quarter's rent, due to them at *Lady-day* then last, in respect of the letting by them to *Neave*, after deducting 40*l.* a-year, which, in respect of the term of fifty-three years, granted by *John Mootham* to *Darby*, they were willing

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willing to allow, out of the payments made by the *Neaves* to Mrs. *Mootham* and her assigns.

Upon this distress the Plaintiff sued out a replevin, and the Defendant made cognisance as the bailiff of *Meux* and Co., for six years and a quarter's rent, due *March* 25th, 1821, by virtue of a demise, under which the *Neaves* successively held the premises, as tenants to *Meux* and Co., at a rent of 70*l.* a-year. The Plaintiff pleaded, as to her father, mother, and herself respectively, *non tenuerunt* and *riens in arrear*. Upon which pleas issue was joined.

At the trial of the cause, before the late Chief Baron *Richards*, at the last *Lent* assizes for the county of *Surry*, without letting the facts of the case go to the jury, a verdict was taken for the Plaintiff, with liberty for the Defendant to move to set it aside, and enter a verdict for the Defendant instead.

Accordingly, in *Easter* term last, *Lens* Serjt. moved for a rule to this effect, on the ground, that in replevin the tenant could not be permitted to dispute his lessor's title, and that the *Neaves* having come in under a lease from *Meux* and Co. could not plead in bar of their avowry any thing short of a legal eviction: he relied on *Balls* v. *Westwood.* (a) A rule *nisi* having been granted,

Taddy Serjt. now shewed cause. It appears clearly, that *John Mootham*, who had a life-interest in the property, was only enabled, under the power conferred by the settlement, to grant a lease for twenty-one years. Instead of this, he grants a lease for fifty-three years, which, as against the person next in remainder, is absolutely void; and Mrs. *Mootham* was entitled to grant a new lease whenever she pleased, after the death of her husband.

(a) 2 *Campb.* 11.

husband. Here, therefore, *Neave*'s tenancy under *Meux* and Co. was determined, and a new tenancy commenced. In *Balls* v. *Westwood* the same tenancy continued up to the time of the action, and the lessor was never informed of a claim conflicting with his own title. But here, *Meux* and Co., who had full notice of the adverse claim, never instructed the *Neaves* to resist, nor did they themselves pay any rent upon the lease under which they now claim. A lessee is not permitted to shew that his lessor had no title, or a bad one, at the time of granting the lease, but he may shew that his lessor's title has determined.

Bosanquet Serjt., in support of the rule, relied on the case of *Balls* v. *Westwood*, and on the principle, that in replevin a tenant cannot dispute his lessor's title. The Plaintiff ought to have disclaimed, and compelled the lessor to bring ejectment, in which case, the tenant being treated as a trespasser, might shew the determination of his lessor's title.

PARK J. I think the verdict in this case ought not to be disturbed; and by so deciding, we shall not affect the case of *Balls* v. *Westwood*, which, in its circumstances, differs essentially from the present. It is perfectly true, that a tenant cannot be permitted to impeach the validity of his landlord's title, but he may shew that it has expired; especially under circumstances such as those we are now called on to consider. *Mootham* grants a lease, which, after several assignments, comes into the hand of *Meux* and Co., but turns out to be void. *Meux* and Co. underlet to *Neave*, but Mrs. *Mootham*, after the death of her husband, being then entitled to the property, gives both *Meux* and *Neave* notice to quit. The question is, whether *Meux* and Co. had not notice of the determination of the title under which

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which they claimed, especially, as they so long acquiesced after that notice had been given. In *Balls* v. *Westwood* Lord *Ellenborough* says, "Did you divest yourself of the possession you obtained under the Plaintiff, and commence a fresh holding under another person?"

Here, according to the language of that Judge, the *Neaves* did hold under another person, and paid rent for more than six years. This, too, was with the knowledge of *Meux* and Co. who were distinctly informed of the fact, and who, themselves, from the beginning of the six years, ceased to pay rent upon the title under which alone they could have any claim. All this time they continued to supply the *Neaves* with beer, and never thought of enforcing any demand under the lease upon which the Defendant now makes cognizance. Their conduct amounts to a complete acquiescence in the adverse title, and the rule they have obtained must therefore be discharged.

BURROUGH J. The verdict as it stands is perfectly right: it is true, a tenant cannot be permitted to dispute his landlord's title; but the question here, is, whether *Meux* and Co. have not by their conduct relinquished all title. After the notice to quit served on them and on their tenant, after their continuing to supply him with beer, and omitting to demand rent for more than six years, it is impossible to contend that they did not acquiesce in the determination of their title. This acquiescence was taken as a matter of fact by the Chief Baron, and agreed in by the Defendant's counsel, as appears from the circumstance of his omitting to go to the jury. The rule, therefore, must be

Discharged.

STOCKHAM *v.* FRENCH.

Nov. 17.

The Court will not on an affidavit of perjury committed by the bail in justifying, set aside the *allocatur* of bail, though the application to set it aside be made on the next *dies juridicus.*

OWEN and *Huff*, the bail in this case being opposed on presenting themselves to justify on *Saturday* last the 15th of this month, *Owen*, after a severe examination, swore that his Christian name was *James*, and that he had never been arrested, imprisoned, or insolvent: *Huff* swore that he had never been in custody; and they were allowed to become bail.

Pell Serjt., on this day, (*Monday*,) upon the affidavit of a person who had arrested *Owen* in 1821 and swore that his Christian name was *John*, — that he had petitioned the Insolvent Debtors' Court for his discharge, and had been remanded for two years, — and likewise upon an affidavit that *Huff* had been in custody in *White-cross-street* prison in 1819, — moved that the *allocatur* of bail might be set aside. He urged, that perjury so gross was a contempt, on which the Court of King's Bench had often acted summarily, and committed the party *instanter*. He cited *Anon.* 1 *Str.* 384., where two persons were set in the pillory for putting in bail in feigned names; *Brown* v. *Gillies* (*a*), where the court interfered without driving the Plaintiff to indict the bail; and he distinguished *Shee* v. *Abbott* (*b*), in which case the application was not made till the ensuing term.

PARK J. The rule which is applied for by this *ex parte* statement would operate on the Defendant, and must be served on him; but no ground has been laid for calling his conduct in question, and if we were to

(*a*) 1 *Chitty*, 372. (*b*) 3 *B. Moore*, 321. 2 *B. & B.* 619.

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grant the rule, we should affect him without hearing what these men may have to answer. I do not clearly see on what ground the case in the Court of King's Bench proceeded. Perjury is undoubtedly a great contempt of court, but a contempt can only be visited summarily while the parties are yet in view of the court. At present the Plaintiff's only remedy is by indictment.

BURROUGH J. This is a charge of perjury against the bail only; but we cannot proceed on affidavit in such a matter; it must be tried by indictment.

Rule refused.

Nov. 19.

ALEXANDER *v.* DIXON.

The Court refused to grant an attachment against a witness who omitted to attend a trial after being served on the 3d of *July* with a subpœna dated the 18th of *June*, and calling on him to attend trial on the 2d of *July*.

ON the 3d of *July* a witness was served with a special subpœnâ, dated the 18th of *June*, and calling on him to attend the trial of this cause on the 2d of *July*; but no notice was given him that the cause had not been tried on the 2d.

The witness having failed to attend the trial, which took place after the 3d.,

Vaughan Serjt. obtained a rule *nisi* for an attachment against him.

Taddy Serjt., who shewed cause, said, that if the witness had been served on the 18th of *June*, it might have been expected he should attend during all the sittings; but here, the subpœnâ and the service of it were inconsistent the one with the other; and,

The Court being also of this opinion,

Discharged the rule, but without costs.

TAYLOR *v.* EVANS.

Nov. 19.

Where a sheriff's officer, who had forborne to arrest a Defendant upon his promising to put in good bail, afterwards, on hearing that such bail would not be forthcoming, himself put in bail without the consent of the Defendant, and then, accompanied by the bail so put in, took the Defendant into custody the day before the Defendant's time for putting in bail expired, the Court discharged the Defendant, and made the sheriff's officer pay costs.

UPON a rule obtained by *Pell* Serjt., and calling upon the Plaintiff to shew cause why the Defendant should not be discharged out of custody, it appeared from affidavits on both sides, that *Wilson*, a sheriff's officer, having in *September* last received a writ to arrest the Defendant, was induced to leave him at large upon Defendant's promising to find good bail. On the 6th of *November*, *Wilson* was informed that the sheriff had been ruled to return the writ, and that both the bail named by the Defendant were in the King's Bench prison; whereupon, without the consent of the Defendant, he caused one *Young* and another person to be entered as bail on the 7th of *November*; on the 9th, *Young* and *Wilson* took the Defendant into custody and confined him in the house of *Swete*, another sheriff's officer, — who was well acquainted with *Wilson*, — although the time for Defendant's putting in bail did not expire till the 10th of *November*. The Plaintiff knew nothing of the transaction.

Vaughan Serjt., who shewed cause against the rule, urged that *Wilson* was justified in what he had done by the Defendant's bad faith; and that, at all events, *Swete* was not responsible, as he could not know under what authority *Wilson* acted.

But the Court thought the whole proceeding was most outrageous, and made the rule absolute, ordering *Wilson*, *Young*, and *Swete* to pay costs.

Rule absolute.

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Nov. 21.

Butler *v.* Stoveld.

A Judge at Chambers having decided that interest was not claimable on a certain judgment for damages, and the Plaintiff having accepted without interest, money tendered, under an order to stay—on payment of the sum recovered and costs—proceedings in an action brought on the judgment, the Court refused to discharge this order and permit the Plaintiff to litigate the question further.

THIS was an action on a judgment for damages, recovered in *assumpsit* upon a special agreement, into which the Defendant had entered as a surety, for the purchase of 901 oak trees at 10*l.* 5*s.* *per* load. The judgment had been suspended by injunction out of Chancery for about two years, and after the commencement of the present action, upon the dissolution of the injunction, the Defendant's attorney applied to a Judge at Chambers to stay proceedings in the action on payment of the sum recovered and costs. Some question arose as to the Plaintiff's right to interest on the judgment, but the learned Judge having decided that it was a case in which interest was not claimable on the judgment, an order was made for staying the proceedings, on payment of the sum recovered and costs only; which the Plaintiff accepted.

Cross Serjt. now moved for a rule to discharge this order and allow the Plaintiff to proceed, contending that interest was due on a judgment for damages, when the damages were meant to cover a specific sum settled by previous agreement.

The Court referred to *Doran* v. *O'Reiley* (*a*) for the rule, that interest on the judgment is allowed only where the original debt carried interest; when

Cross contended, that at any rate the party had a right to try the question before a jury. The injunction might have been fraudulent, and the Plaintiff had been injured by two years' delay.

Per Curiam. The Plaintiff should have refused the sum tendered at the Judge's Chambers if he meant to persist in his claim for a larger sum.

Rule refused.

(*a*) 3 *Price*, 250.

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COPLAND v. POWELL.

Nov. 22.

A sheriff who levies arrears of taxes under 48 *G.* 3. *c.*141. No. 5. par. 2. is not entitled to notice of an action to be brought against him for any thing done under the provisions of that act.

ACTION against the sheriff of *Kent*, for an excessive levy, in respect of an arrear of taxes, under 48 *G.* 3. *c.* 141., No. 5. par. 2.

At the trial before *Richards* C. B., at the *Kent Spring* assizes, 1823, no notice of action appeared to have been given to the sheriff, but a verdict was found for the Plaintiff, subject to a motion to be made to this court, to set the verdict aside and enter a verdict for the Defendant.

Taddy Serjt., accordingly, in *Easter* term, 1823, moved for such a rule, on the gronnd that the sheriff ought to have received notice of this action. By the 43 *G.* 3. *c.* 99. *s.* 33., collectors are authorised to distrain for arrears of duties imposed by that act, and under *s.* 70. of the act, they are entitled to a month's notice of any action to be brought against them for any thing done in pursuance of that act, or any act for granting duties to be assessed under the regulations of that act. Then, the duties granted by 43 *G.* 3. *c.* 161., are, by *s.* 5. of that act, to be levied under the regulations of 43 *G.* 3. *c.* 99.: and all the powers, authorities, methods, rules, directions, penalties, forfeitures, clauses, matters, and things contained in that or any act or acts, relating to the duties under the management of the commissioners for the affairs of taxes, are to be observed as fully as if the same were repeated in the body of the last act. By that act, too, a month's notice is to be given previously to bringing any action for any thing done under the act. By the 48 *G.* 3. *c.* 55. *s.* 2., the duties imposed by 43 *G.* 3. *c.* 161. are repealed, " save always and except the several powers, provisions, clauses,

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penalties, matters, and things," in that act contained. By the 48 *G.* 3. *c.* 141., after debts due in respect of taxes have been recorded in the Exchequer, the sheriff is empowered to levy them (No. 5. par. 2.) and by No. 3. *s.* 3. of that act, nothing therein contained is in any way to impeach or affect the powers or provisions of the said acts (*i. e.* any of the acts relating to taxes in force at the time of passing that act) for the recovery of the said duties. These acts are all *in pari materiâ.* Nothing is repealed except what is expressed to be the subject of repeal, and therefore, the sheriff, who, under 48 *G.* 3. *c.* 141., performs the duties imposed upon the collector by 43 *G.* 3. *c.* 99., is entitled to the same protection as the collector, and cannot be sued without notice.

Bosanquet Serjt., who shewed cause against the rule, argued, that the mode of levying directed to be pursued under the 43 *G.* 3. *c.* 99. *s.* 33. was altogether different from that pointed out by 48 *G.* 3. *c.* 141., No. 5. par. 2.; that the latter act under which the levy was to be made by the sheriff instead of the collector, contained no clause by which a Plaintiff was compelled to give the sheriff notice of action; that the notice required by the former act applied only to the persons specified in that act; and that, if it had been intended to extend it to the sheriff, who was not named in the former act, a specific clause to that effect would have been inserted in 48 *G.* 3. *c.* 141.

Taddy was heard in support of his rule, and now the judgment of the Court was delivered by

PARK J. This case came before the Court the other day, upon a motion for leave to enter a nonsuit, upon the ground, that there had been no notice of action given

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to the sheriff, under 43 *G.* 3. *c.* 99. *s.* 70., which requires one month's notice to be given to *any person or persons*, of any action or suit to be brought against them for any thing done in pursuance of that act.

This was an action brought for an excessive levy, under a writ of *levari facias* issuing out of the Court of Exchequer.

Upon the objection above stated being made by the counsel for the Defendant, the sheriff, the late Lord Chief Baron reports, that he overruled the objection; and upon this supposed mistake of his Lordship in point of law, this motion has been made. But we are of opinion that his Lordship was right. The statute of the 43 *G.* 3. *c.* 99. has made several provisions for various acts to be done by a vast number of persons, in the execution of it, with respect to the taxes then imposed: and many of them being persons not probably well acquainted with the law, in the seventieth section that protection is thrown around them, which has been the subject of argument at the bar.

But there is no duty imposed by the statute upon sheriffs of counties, their names are never mentioned, they have nothing to do with the collection of the taxes: and, therefore, when the words *person or persons* are referred to, it cannot mean persons in general, but such persons as are the subject of the precedent legislative regulation. It is admitted, moreover, that, by 48 *G.* 3. *c.* 55. *s.* 2., the act of parliament just before referred to is in great measure repealed; but it is argued, that the provision respecting the notice, &c. under the seventieth section, is still continued; for that although it repeals all the duties of the 43d, 45th, and 46th of the late king's reign, it adds, "save always and except the several powers, provisions, clauses, penalties, matters, and things, contained in the last-mentioned act of the 43d of his majesty, for ascertaining, assessing, collecting,

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levying, paying, and accounting for the said duties; which *powers*, &c. shall be and continue in full force and effect, for ascertaining, assessing, &c. the duties granted by this act; save also and except, in all cases relating to the ascertaining and assessing any of the said duties hereby repealed, which at any time after the respective periods before mentioned, for the commencement of the duties granted by this act, shall not have been charged within the years for which the said duties ought to have been charged; and also save and except as to the recovering, collecting, paying or accounting for any arrears of the several duties hereby repealed, which may remain unpaid, at the said periods respectively as aforesaid, and any penalties or forfeitures then incurred."

Now if it were necessary, but which in our view of the case it is not, to decide whether the seventieth section of 43 *G.* 3. *c.* 99. was still reserved in those exceptions, we should be inclined to think it was not, for they seem only to reserve, first, the means of ascertaining the new duties in the same manner as before; second, the means of ascertaining such duties as had not been ascertained within any preceding year before the repeal: and thirdly and lastly, the mode of recovering such arrears as had accrued under the old act, and any penalties and forfeitures then incurred, prior to the repeal. Neither is the sheriff mentioned in *this* act of parliament, but it is contended, that as this act of parliament reserves the seventieth section of 43 *G.* 3. *c.* 99. it is now to be applied to any subsequent statute giving authority to any *other person or persons* to act, and that such is now the case with sheriffs, under the 48 *G.* 3. *c.* 141. No. 5. *s.* 2. "Rules and directions for paying to the receiver-general, and accounting for the duties received by the collectors." I will, for the argument, suppose, that the seventieth section of 43 *G.* 3. *c.* 99. still remains in force, but can it be for a moment supposed, that when the last statute

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directs the receiver-general to return his schedule of defaulters to the barons of the Court of Exchequer, who shall issue their process to the sheriff or other officer, to levy by *due* course of law, &c., that the sheriffs are entitled to notice, not having it expressly secured to them? Here, the sheriff is called upon to do nothing more than is within the usual and general scope of his duty, *viz.* to obey the process and conform to the directions of a supreme court: he exercises no judgment, and no peculiar burdens are cast upon him; and it as well might be contended, that he was entitled to a notice of action for an excessive levy, upon any common writ of *fi. fa.*, as upon this. By the law of *England*, bringing an action is sufficient demand and notice: and wherever the contrary is the case, it is and must be matter of legislative enactment. We are inclined to think this enactment is repealed; but if not, we are of opinion, that it only meant to embrace within its provisions such persons as are before named, and cannot extend to such superior officers, as sheriffs, according to the well known rule laid down in 2 *Rep.* 46. *b.*, that statutes, which treat of things or persons of an inferior rank cannot be, by any general words, extended to those of a superior; as a statute, treating of deans, prebends, *and others having spiritual promotion*, was held not to extend to *bishops*, notwithstanding the generality of the latter words, for if it had been otherwise intended, the superior persons would have been in the beginning of the sentence, and cannot be implied. This rule, therefore, for entering a nonsuit must be discharged.

Rule discharged accordingly.

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Nov. 25.

JOHN and THOMAS STEWART *v.* LAWTON.

In order to give an indenture of apprenticeship in evidence, it is not necessary under 8 *Ann.* c. 9. to call on the party at the time of giving it in evidence, to make oath as to the amount of premium actually paid.

ACTION by an apprentice and his father against the master, for a breach of covenant, in an indenture of apprenticeship.

At the trial, before *Bayley* J., *York Summer* assizes, 1823, after the Plaintiffs' witnesses had proved the execution of the indenture, and before it was read, the Defendant's counsel objected to the reading of it, till the plaintiffs had themselves first made oath, pursuant to the 8 *Ann. c.* 9. *s.* 43. (*a*), that the sum inserted in the indenture, as the premium paid with the apprentice, was really and truly all that was directly or indirectly given, paid, secured, or contracted for, on behalf or in respect of such apprentice.

The Plaintiffs were not called, but the deed, which had been duly stamped, was read, and the learned judge allowed the cause to proceed, reserving the point for the opinion of this Court; and a verdict having been found for the Plaintiffs,

Taddy Serjt., upon the objection made at the trial, obtained a rule, calling on the plaintiffs to shew cause

(*a*) The thirty-second section of 8 *Ann. c.* 9. imposes a poundage duty of 6*d.* in the pound upon premiums not exceeding 50*l.*; and 1*s.* in the pound upon premiums exceeding 50*l.* And the forty-third section enacts, "That no indenture or writing required by this act to be stamped as aforesaid shall be given or admitted in evidence in any suit to be brought by any of the parties thereunto, unless such party on whose behalf the same shall be given or admitted in evidence do first make oath that, to the best of his or her knowledge, the sum or sums therein for that purpose inserted or mentioned was or were really and truly all that was directly or indirectly given, paid, secured, or contracted for on behalf, or in respect of such clerk, apprentice, or servant, to, or for the benefit of the master or mistress to, or with whom such clerk, apprentice, or servant was put or placed."

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why the verdict should not be set aside, and instead thereof a nonsuit be entered, or a new trial had.

Cross Serjt. now shewed cause. By the preamble it appears, that the statute 8 *Ann. c.* 9. was passed only for one year. The objection now raised is of the first impression, and, at all events, the statute has been so little acted on, that it may now be considered obsolete, the payment of the requisite duty, according to the amount of the premium, being secured by a penalty of 50*l.*, under 9 *Ann. c.* 21. But, according to Lord *Coke* (*a*), "in many cases the common law will control acts of parliament, and sometimes adjudge them to be utterly void: for where an act of parliament is against common right and reason, and repugnant or impossible to be performed, the common law will control it, and adjudge such act to be void." And he gives an instance under the statute of *Carlisle*. This rule applies directly to an act like the present, which is so far repugnant to common right as to require a party to be examined in his own cause. However, admitting the clause to be still in force, it does not require the party to take the oath at the trial, or prescribe, when, where, or how he is to take it. Neither is it at all inconsistent with this clause, that the fact required to be sworn to by the party, should be proved by other and better testimony, —as the oath of indifferent witnesses; just as the original examination of a soldier, touching his settlement, may be given in evidence, though the mutiny act has provided that a copy shall be sufficient.

Taddy. The statute is not fallen into desuetude, nor is the objection of the first impression. The same point was made in *Gye* v. *Fenton* (*b*), though the court did

(*a*) 8 *Rep.* 118. *Dr. Bonham's case.* (*b*) 4 *Taunt.* 880.

not

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not come to any decision upon it. The doctrine in Dr. *Bonham's* case applies only where a statute requires something impossible to be done; but here the oath of the party is the chief security for ensuring to the revenue the duty upon the exact premium paid. But for such oath it never can be known what was the sum actually received by the master. The act is precise in requiring the oath to be made before receiving the indenture in evidence. It does not appear that the commissioners for the affairs of stamps have any authority to administer an oath in such a case, and where the words of the statute are so explicit and directory there is no room for making any presumption.

PARK J. This is an objection, *strictissimi juris*, and the Court will do all in their power to prevent it from taking effect; but many points have been urged in the argument for the Plaintiff, to which I cannot accede. It is not correct to say, that this act has ceased to be in force; it has always been, and still is, recognised as an existing act. Nor is there any weight in the objection, that the Plaintiff could not be examined at the trial. If an act of parliament requires it, a Plaintiff may undoubtedly be examined. So when the Lord Chancellor requires it, a court of common law is equally bound to examine a Plaintiff. These are anomalies which have place every day, under acts of parliament, and orders of the Court of Chancery. However, on the whole, I think we ought not to yield to the objection which has been made against the verdict. The objection taken by the counsel at the trial was, that the Plaintiff was not there called to make oath as to the amount of premium paid upon the apprentice-deed. Except in *Gye* v. *Fenton*, there is no instance of a similar objection having been taken, and I am disposed to agree with what fell from Lord *Kenyon*, in *Leigh* v. *Kent*:

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Kent (a): that was an action to recover penalties for non-residence: it was objected that no affidavit had been filed, pursuant to 21 *Jac.* 1. *c.* 4., that the offence was committed in the county where the action was brought: Lord *Kenyon* said, "I think no such affidavit is necessary; it has never been usual to take that step; and though where the words of an act of parliament are plain, it cannot be repealed by non-user, yet where there has been a series of practice, without any exception, it goes a great way to explain them, where there is ambiguity." The objection in that case was very similar to that with which we have been pressed to-day; but *Buller* J. says, "after a long course of years, during which time it has not been the practice to file affidavits in such cases as the present, the court will endeavour to get rid of the objection." In the present case it seems to me the statute intended the oath should be taken before the commissioners for stamps, because in that way only could the collector arrive at the knowledge of the sum that had actually been paid on the instrument. The only difficulty on my mind was, whether it ought not to have been shewn at the trial, that such an affidavit had been made by the Plaintiff; but as that was not the way in which the objection was put at the trial, I think the rule ought not to be made absolute.

BURROUGH J. The objection was, that before giving the indenture in evidence, the Plaintiff did not swear at the trial to the amount of the premium paid: I think he could not have been called on to do so, but that the affidavit should have been made before the commissioners at the stamp office; and the argument in *Gye* v. *Fenton* is very strong to this effect. Can we then presume that such an affidavit had been made?

(a) 3 *T. R.* 364.

I think

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I think we can. The stamp on the indenture is consistent with the amount stated to have been paid, and from that circumstance the jury might fairly raise the necessary presumption; but except in certain excepted cases, as, for instance, actions against the hundred, a Plaintiff canot be allowed to appear as a witness upon the trial of his own cause. We do no violence to any principle in saying, that this rule cannot stand, and that the verdict is right.

Rule discharged.

Nov. 26.

HOPCRAFT *v.* FERMOR.

The Court will grant an attachment against a party for non-performance of an award which has been made a rule of court, though he reside out of the jurisdiction of the court.

TADDY Serjt. had obtained a rule, calling on the Defendant to shew cause why an attachment should not issue against him for non-performance of an award which had been made a rule of court. After submission to arbitration, the Defendant had gone to reside at *Boulogne*, in *France*, where a copy of the award and of the rule *nisi* for an attachment were served on him.

Pell Serjt., who shewed cause against the rule, argued, that while the Defendant lived out of the jurisdiction of the Court, he could not be guilty of a contempt; and that, therefore, the present motion was of the first impression. It was at all events an application to the discretion of the Court, who would not issue process where it would be altogether nugatory.

Taddy. The party having been before the Court previously to his going abroad, is clearly in contempt for refusing to perform the award: if so, the Plaintiff is entitled to the attachment *ex debito justitiæ*, for the

statute

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statute 8 & 9 *W.* 3. *c.* 13. has enacted, that the party refusing to perform an award which has been made a rule of court, shall be liable to all the penalties of a suitor or Defendant, and process is never refused against a Defendant on the ground of his being out of the kingdom. In the one case it may be convenient to have the process, in the other, the attachment, ready to serve in case the party should unexpectedly return.

The Court took time to consider; and on this day, said the attachment might issue; adding, that it was in the nature of a civil process, and whether it could be served with effect or no, was not for the Court to enquire.

Rule absolute.

BLICK v. DYMOKE.

Nov. 26.

A Defendant, under terms of pleading issuably, cannot assign special causes of demurrer, even though the causes assigned be matters of substance.

THE Plaintiff declared against the Defendant for a breach of covenant in not suffering a common recovery.

The Defendant who was under terms of pleading issuably, demurred, assigning for causes of demurrer: first, that it did not appear on the declaration that the Defendant had a sufficient estate to suffer a recovery; and, secondly, that it did appear the Plaintiff had the first estate of freehold.

Bosanquet Serjt. thereupon obtained a rule *nisi* for the Plaintiff to sign judgment, unless the Defendant should strike out the special causes of demurrer.

Taddy, shewed cause. The rule that a Defendant who is under terms to plead issuably cannot be allowed,

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to demur specially must be understood to comprehend only demurrers to matters of form. The causes assigned for demurrer in the present case are matters of substance, and might be argued under a general demurrer, which has always been esteemed equivalent to an issuable plea. The only reason for assigning the cause specially, is the difficulty that sometimes exists in distinguishing between matters of form and matters of substance. In *Berry* v. *Anderson* (a), and *Bell* v. *De Costa* (b), the causes assigned were matters of form which the Defendant could not take advantage of while under terms to plead issuably.

But the Court were clearly of opinion, that in the present case the Defendant could not be allowed to assign special causes of demurrer, and

The Defendant undertaking to strike them out, the Rule was discharged.

(a) 7 *T. R.* 530. (b) 2 *B. & P.* 446.

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YOUNG v. GADDERER.

Where a Defendant, after delaying and deluding a Plaintiff with promises to pay, pleaded a plea of judgment recovered, the Court refused to set the plea aside and permit Plaintiff to sign judgment.

ACTION on a bill of exchange, to which the Defendant pleaded a judgment recovered for the same debt.

Pell Serjt., upon an affidavit which shewed that this plea was not resorted to till the 25th of *November*, after the Defendant had succeeded in gaining time, and deluding the Plaintiff during the preceding part of the term by repeated promises to pay, moved that the Plaintiff might be at liberty to set aside this as a sham plea, and sign judgment. He referred to *Richley* v. *Proone*

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Proom (a), where, to an action for use and occupation, the Defendant having pleaded the delivery of a ton of *Riga* hemp in satisfaction, the Court permitted the Plaintiff to sign judgment; no longer requiring for the ground of interference, as in *Bartley* v. *Godslake* (b), that the plea should be so far ingenious as to occasion perplexity and expence to the Plaintiff.

PARK J. There is no ground for our interference in the present case. The principle which has generally been acted on in the Court of King's Bench is, that if the plea, being false, be also such as to demand different modes of trial, or so ingenious as to occasion perplexity and expence to the Plaintiff, the Court will allow him to sign judgment. The first case on the subject was *Solomons* v. *Lyon* (c), where the Court permitted the Plaintiff to amend without payment of costs, because the Defendant had pleaded a sham plea, and with a view to discountenance such practice. In *Thomas* v. *Vandermoolen* (d), where the Defendant had falsely pleaded payment, and a judgment recovered, the Court permitted the Plaintiff to sign judgment, because issues had been raised which required different modes of trial, and imposed on the Plaintiff an improper difficulty: and in *Bartley* v. *Godslake*, where the Defendant pleaded, that in satisfaction of the plaintiff's claim he had indorsed to him a bill of exchange and had assigned an *Irish* judgment; the Court said, "This being an ingenious plea, which the Plaintiff's attorney could not be expected to understand, would put him to the necessity of consulting counsel, and thereby occasion delay and expence." In the present case only one issue has been

(a) 1 *B. & C.* 286.
(b) 2 *B. & A.* 199.
(c) 1 *East*, 369.
(d) 2 *B. & A.* 197.

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raised; the plea is one of the most usual, and the affidavit in support of the rule does not allege, as it ought to have done, (*Bones* v. *Punter* (*a*), that the plea is false.

Rule refused.

On the following day *Park* J. referred to *Merington* v. *Becket* (*b*), as confirmatory of the view the Court had entertained with respect to the practice in the Court of King's Bench.

(*a*) 2 *B.* & *A.* 777. (*b*) 2 *B.* & *C.* 81.

Nov. 27.

REDFERN *v.* SMITH.

In a writ of waste, it appeared that the Defendant had (though not within six years) cut down timber on an estate in the proportion of thirty-seven to fifty; but it was admitted that many of the trees had been felled for the benefit of the estate. The jury, — who were directed to find for the Plaintiff if they thought th… …ling …us to the inheritance, for the Defendant if not injurious, — having found for the …ndant, the Court granted a new trial.

THIS was a writ of waste, tried before *Garrow* B., at the last *Derbyshire* assizes. The Defendant was tenant for life, and the waste complained of was, the cutting down trees at various times within the last twenty years. All the trees on the estate were valued at about 50*l.*, the portion cut down by the Defendant at about 37*l.*, but no trees had been felled within six or seven years; and the Plaintiff's witnesses admitted, on cross-examination, that many of the trees had been cut down for the benefit of the estate. The Defendant called no witnesses, and the learned Judge directed the jury, that if they esteemed the felling of the trees to have been injurious to the estate, they should find for the Plaintiff; if they thought the felling not injurious, but done *bonâ fide* with a view to benefit the estate, they should find for the Defendant.

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The jury having found for the Defendant, *Pell* Serjt. obtained a rule *nisi* for a new trial, on the ground, that the jury had been misdirected, and had found their verdict against evidence.

Vaughan and *Bosanquet* Serjts. shewed cause. The direction to the jury was correct; for unless the waste done be injurious to the inheritance, the reversioner has no cause of action. (*a*) *Bracton* says (*b*), "*Vastum erit injuriosum nisi vastum* ita modicum fuerit *propter quod non sit inquisitio facienda.*" And in *The Keepers of Harrow School* v. *Alderton* (*c*) it was decided, that where the damages are very small in amount, the Defendant is entitled to judgment. Then this writ is highly penal (2 *Inst.* 307.): the party recovers treble damages, besides the place wasted; and the Court will not, in any hard action, grant a new trial because the verdict has gone contrary to evidence, (*Reavely* v. *Mainwaring* (*d*), much less in a penal one. Besides, from the length of time which elapsed before this writ was sued out, the Plaintiff may fairly be presumed to have waived the forfeiture.

Pell. Where so large a proportion of all the timber on the estate was felled, the felling must have been injurious to the inheritance. From the case of *Lord Selsea* v. *Powell* (*e*), it clearly appears, that the court will grant a new trial in a penal action, where the verdict is contrary to evidence; but according to *Hammond* v. *Webb* (*f*), the statute of *Gloucester*, 6 *Edw.* 1. *c.* 5., which gives the writ of waste, is not penal but remedial.

(*a*) *Hetley*, 35., *per Richardson* J.

(*b*) Lib. 4. c. 18. s. 12. fol. 316. *b.*

(*c*) 2 *B. & P.* 86.

(*d*) 3 *Burr.* 1306.

(*e*) 6 *Taunt.* 297.

(*f*) 10 *Mod.* 281. *per Salkeld*, *arguendo.*

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Per Curiam. We doubt whether the whole of this case has been sufficiently understood, and without giving any opinion on the points which have been argued, we think there must be a new trial.

Rule absolute.

Nov. 27.

DODINGTON *v.* HUDSON.

A Defendant having at the trial of an action on the case, agreed to enter into a rule of *nisi prius*, to repair and reinstate premises which he had wrongfully damaged, it was referred to a barrister to settle what what sum should be paid in lieu of his doing this. The Defendant's attorney produced no witnesses at the first meeting, under the arbitration, of which he had had ample notice, but the Plaintiff's witnesses gave in their estimate, and the arbitrator, after viewing the premises, appointed a day for a second meeting. The Defendant's attorney called before that day, and said that his witnesses (two surveyors, who had known the premises before the action,) could not attend; the arbitrator, although one of these witnesses might have attended the first meeting, appointed a third meeting for the evening before he was about to leave *London* for the circuit: on the morning of that day, Defendant's attorney called on the arbitrator, and left an affidavit, stating that one of the two surveyors was confined to his bed, and the other gone to *France*. The arbitrator suggested th at other surveyors were equally capable of making an estimate for the Defendant, and offered, if the Defendant's attorney would name a day, to come to *London* to hear them, or the two first proposed; the attorney refused to name a day, or to procure other surveyors, though another surveyor and a carpenter had attended the trial of the cause on Defendant's behalf. The arbitrator then gave the Defendant's attorney notice he should make his award if required by the Plaintiff; and being required, awarded a sum to be paid to the Plaintiff.

The Defendant's attorney swearing he understood the arbitrator meant to have called another meeting, the Court set aside the award, though no objection was made to the amount awarded; leaving, however, the Plaintiff at liberty to enforce the Defendant's agreement to enter into the rule of *nisi prius* for the reinstating the premises.

UPON affidavit, this case appeared to be as follows.

Action by a reversioner against the Defendant for pulling down and damaging a certain dwelling-house, as set forth in the declaration.

The cause was tried at the *Surrey* Summer assizes, 1822, by a special jury, after a view; and when the Plaintiff's counsel was about to prove the damage done, the Defendant's counsel proposed, that in the event of a verdict passing for the Plaintiff, the damages should be repaired, and the Plaintiff's premises reinstated by the Defendant; and two surveyors, (one on the part of

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the Plaintiff, and one on the part of the Defendant,) were agreed upon by the respective counsel to direct the repairs and reinstatement, and the Defendant was to enter into the necessary rule accordingly. A verdict having been found for the Plaintiff,.

The Defendant, in *Michaelmas* term, 1822, obtained a rule, calling on the Plaintiff to shew cause why the verdict should not be set aside; which rule was in *Easter* term following discharged.

Defendant having refused to enter into the rule, as agreed upon at the trial, Plaintiff, in *Trinity* term, 1823, obtained a rule, calling on the Defendant to shew cause why the Defendant should not forthwith, at his own expence, reinstate the premises of the Plaintiff, in respect of which the action was brought, and why the work necessary to be done should not be under the inspection of the two surveyors, or why the associate should not draw up a rule of *nisi prius*, so ordering, as agreed upon at the trial of the cause.

The Defendant shewed cause against the rule, upon the affidavits of himself and his surveyor, that he could not comply with the agreement entered into upon the trial, without incurring penalties under the building act; whereupon it was referred to a barrister, to settle and ascertain the amount of the damages to be paid by the Defendant to the Plaintiff or his attorney, for reinstating the premises of the Plaintiff, in respect of which the action was brought, as agreed upon at the trial of the cause, and that the Plaintiff should be at liberty to indorse such damages on the *postea*, instead of the nominal damages of 1*s*.

After due notice had been given to both parties, a meeting took place before the arbitrator, on the 23d of *June* last, at which were present the Plaintiff's attorney, two surveyors on his behalf, the Defendant and the Defendant's attorney; all of them having first viewed the premises. The Plantiff's surveyors gave in and substantiated

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tiated their estimate of the expense of reinstating the premises, when the Defendant's attorney said he was not prepared with any witnesses, as he wished first to see on what footing the business was to proceed. The arbitrator then proposed to hear the Defendant's witnesses the next day, but the Defendant's attorney saying he should not be ready, the next meeting was fixed for the 26th of *June*.

On the 24th of *June* the Defendant's attorney stated that his witnesses could not attend on the 26th, when the arbitrator again postponed the next meeting till the evening of the 2d of *July*, the day before he was about to leave *London* for the circuit. On the morning of the 2d of *July* the Defendant's attorney called on the arbitrator, and left an affidavit, stating that the Defendant's witnesses, two surveyors, who had attended at the trial, and who knew the premises before the action was brought, could not attend; one of them, (*Gwilt*,) being confined to his bed by the gout, the other, *I'anson*, being unavoidably absent from *London*, which he had quitted for *France* on the 24th of *June*.

The arbitrator then exhorted the Defendant's attorney to procure other surveyors to make an estimate; but the attorney refusing to do this,—although *Reed*, another surveyor, and *Robinson*, a carpenter, had been present on behalf of Defendant at the trial of the cause,—the arbitrator offered (if the Defendant's attorney would fix a day) to return from the circuit, for the purpose of hearing *Gwilt* and *I'anson*, or any other witnesses; but the Defendant's attorney refused to fix any day. The arbitrator then requested the Defendant's attorney to inform the Plaintiff's attorney it would be useless for him to attend that evening, with a view to any further hearing of the case; but he also warned the Defendant's attorney, that if the Plaintiff's attorney chose to appear and insist on an award, he the arbitrator should feel himself bound to make one. The Defendant's attorney

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thereupon gave notice to the Plaintiff's attorney, that he, the Defendant's attorney, should not be prepared to attend the arbitrator that evening; when the Plaintiff's attorney informed him, that he, the Plaintiff's attorney, would attend and call for an award. This was done accordingly, and the arbitrator settled and awarded the damages to be paid by the Defendant, at the sum estimated by the Plaintiff's surveyors.

Taddy Serjt. on a former day in this term, upon an affidavit by the Defendant's attorney, that after the interview of the morning of the 2d of *July* he left the arbitrator fully and unequivocally satisfied and convinced, that the meeting which had been appointed for the evening could not take place, — that the arbitrator did not intend to make his award, without hearing the evidence of *Gwilt* and *I'anson*, — and that a further appointment for hearing them would be made by the arbitrator — obtained a rule *nisi* for setting aside this award.

Peake Serjt. now shewed cause against the rule, and urged, that, under the circumstances, the arbitrator was justified in making his award, as the Defendant's attorney had evidently been endeavouring, by affected delay, to hold the Plaintiff over the long vacation. It was obvious that other surveyors might have been found, equally capable of making an estimate for the Defendant as *Gwilt* and *I'anson*, especially *Reed* and *Robinson*, who were present at the trial: but if the Court should think otherwise, one surveyor would have answered the purpose as well as any greater number; and had the Defendant's attorney been disposed to act fairly, *I'anson* might have attended the arbitrator at the first meeting on the 23d of *June*, as it did not appear he had quitted *London* till the 24th. It would be observed, too, that there was not the slightest insinuation that the arbitrator had settled the damages at too high an amount.

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The Court requested that the parties would again go before the arbitrator; but the Defendant refusing to accede to this, they set aside the award, leaving the Plaintiff at liberty to enforce against the Defendant his agreement to enter into the rule of *nisi prius* for reinstating the premises.

Rule absolute.

Nov. 27.

DILLAMORE v. CAPON.

In order to proceed under the *Southwark* Court of Request's Act, 22 G. 2. c. 47. both Plaintiff and Defendant must be resiant within the jurisdiction of the court.

THIS was an action to recover the price of a horse, for which the Defendant had agreed to give 30*l*., and another horse which was valued at 10*l*. The 10*l*. horse was delivered to the Plaintiff; but the horse sold by the Plaintiff having died shortly after it had been delivered to the Defendant, he refused to pay the 30*l*.; and at the trial of the cause before *Park* J., *London* sittings after *Easter* term, 1823, endeavoured to shew, that the Plaintiff's horse had been mortally diseased at the time of the sale. This the jury were induced to believe; but it appearing that the Defendant had sold the carcase and skin of the dead horse for 1*l*. 11*s*. 6*d*., a verdict was ultimately entered for that sum: upon which

Vaughan Serjt., upon an affidavit that the Defendant lived within the jurisdiction of the *Southwark* Court of Requests (*a*), obtained a rule *nisi* to deprive the Plaintiff

(*a*) By 22 G. 2. c. 47. s. 4. which establishes a court of requests for the borough of *Southwark* and its vicinity, it is enacted, "That from and after the 29th day of *September*, 1749, it shall and may be lawful to and for every resiant and inhabitant of the said town and borough of *Southwark*, and for all the resiants and inhabitants within the several parishes of *St. Saviour*, *St. Mary*, at *Newington*, *St. Mary Magdalen*, *Bermondsey*, *Christ Church*, late part of *St. Saviour's*, *St. Mary Lambeth*

tiff of his costs, and obtain them for the Defendant, under 22 G. 2. c. 47. s. 6.

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Pell Serjt. shewed cause.

The clause which deprives the Plaintiff of his costs, in

Lambeth and *St. Mary*, at *Rotherhithe*, in the county of *Surrey*, and to and for all and every person and persons renting or keeping any shop, shed, stall, or stand, or seeking a livelihood within the said town and borough, or within any of the parishes, limits, or precincts aforesaid, who now have or hereafter shall have any debt or debts owing unto him, her, or them not exceeding the sum of forty shillings, by any person or persons whatsoever inhabiting or seeking a livelihood within the said town and borough, or within any of the parishes, limits, or precincts aforesaid, to cause such debtor or debtors so inhabiting, or seeking a livelihood as aforesaid, to be warned or summoned by the chief bailiff of such town and borough for the time being, or his deputy officer or officers, (who are hereby appointed, authorised, and required to execute all warrants, precepts, and process of the said Court of Requests,) by writing left at the dwelling-house or place of abode, shop, shed, stall, stand, or any other place of dealing of such debtor or debtors, or by any other reasonable warning or notice, to appear before the commissioners of the said court, to be held at or in the place aforesaid; and that the said commissioners, or any three or more of them, shall, after such summons as aforesaid, have full power and authority, by virtue of this act, to make or cause to be made such acts, order or orders, decrees, judgments, and proceedings between such party or parties, plaintiffs, and his, her, or their debtor or debtors, defendants, touching such debts not exceeding the sum of forty shillings in question before them, as they shall find to stand with equity and good conscience; and all such acts, decrees, judgments, and proceedings, order or orders, shall be entered and registered in a book to be kept for that purpose by the clerk or clerks of the said court, or his or their sufficient deputy or deputies, and shall be observed, performed, and kept in all parts, as well by the plaintiff as the debtor or defendant."

Sect. 5. "And for the more due and regular proceeding in the said court, intended to be established by this act, it is hereby further enacted, that it shall and may be lawful for the said commissioners, or any three or more of them, to administer an oath to the plaintiff or defendant, and to such witness or witnesses as shall be produced by each party, and also to all the officers of the said court, for or concerning any business relative thereunto, if the said commissioners, or any three or more of them, shall so think it meet."

Sect. 6. "And be it further enacted

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in a case like the present, has been repealed by 4 *G.* 4. *c.* 123. *s.* 16.; and though that act was not passed till after the commencement of the present action, it was passed before this application, and is, therefore, conclusive against it. At all events, even with respect to the present action, the 22 *G.* 2. *c.* 47. is repealed, at least as to the clause about costs, by the 46 *G.* 3. *c.* 87.; and the provisions of that act do not apply to a case like this, where the Plaintiff seeks to recover, not a debt, but unliquidated damages for a breach of contract. Even if the 22 *G.* 2. *c.* 47. should be holden to be still in force, it is inoperative except where both parties live within the jurisdiction of the Court of Conscience.

Vaughan contended, that 22 *G.* 2. *c.* 47. was not repealed, but extended, by 46 *G.* 3 *c.* 87., and that it was only required by the sixth section of 22 *G.* 2. *c.* 47., that the Defendant should live within the jurisdiction of the court, while under 46 *G.* 3. *c.* 87. *s.* 6., persons

enacted by the authority aforesaid, that if in any action of debt, or action on the case upon an *assumpsit* for recovery of any debt, to be sued or prosecuted against any person or persons aforesaid, in any of the king's courts at *Westminster*, or elsewhere out of the said Court of Requests, it shall appear to the judge or judges of the court where such actions shall be sued or prosecuted, that the debt to be recovered by the plaintiff in such action doth not amount to the sum of forty shillings, and the defendant in such action shall duly prove, by sufficient testimony to be allowed by any the judge or judges of the said court where such action shall depend, that at the time of commencing such action such defendant was inhabitant and resiant within the said town and borough of *Southwark*, or any of the parishes, limits, or precincts aforesaid, in the county of *Surrey*, and was liable to be warned or summoned before the said Court of Requests for such debt, then and in such case the said judge or judges shall not allow the said plaintiff any costs of suit, but shall award that the said plaintiff shall pay so much ordinary costs to the party defendant, as such defendant shall justly prove before the said judge or judges it hath truly cost him in the defence of the said suit."

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living elsewhere are entitled to sue. As to the cause of action, the 1*l.* 11*s.* 6*d.* was a distinct debt for money had and received to the Plaintiff's use. The 4 *G.* 4. *c.* 123. was passed too recently to affect any proceeding in the present action, and the Court of Requests' acts were always construed liberally.

Cur. adv. vult.

This day *Park* J. delivered the judgment of the Court.

We are of opinion, under the circumstances I am about to state, that we ought not to accede to the application which has been made on the part of the Defendant, under the stat. 22 *G.* 2. *c.* 47., although we are of opinion that that act has not been repealed by the 46 *G.* 3. *c.* 87., the title of which is, "An act to explain, amend, and render more effectual two acts passed in the twenty-second and thirty-second years of his late majesty, for the more easy and speedy recovery of small debts within the town and borough of *Southwark*, and the several parishes and places in the said act mentioned." Whence it appears, that the 22d *G.* 2. *c.* 47. is only so far affected as concerns the extending of the jurisdiction of the Court of Requests. But the point on which we decide, and which never appears to have been taken in any of the cases on the *Southwark* act, is, that under the provisions of that act, both the Plaintiff and Defendant must be resiant within the jurisdiction of the inferior court. The words of the *London* Court of Requests' act, 14 *G.* 2. *c.* 10., are nearly the same as those employed in 22 *G.* 2. *c.* 47. And in *Webb* v. *Brown* (a) (a case under the *London* act) it was holden, that both Plaintiff and Defendant must be resiant within the jurisdiction; and under the fourth and fifth sections of the 22 *G.* 2. *c.* 47. it is also equally

(a) 5 *T. R.* 535.

clear,

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clear, that both parties must be so resiant. It is contended, that the 46 *G.* 3. *c.* 87. has made some difference in this respect, because (*s.* 6.) it gives the privilege of suing in the *Southwark* Court of Requests, to all persons residing in the parishes mentioned in the preamble, and *elsewhere*: but we think otherwise. The act having mentioned all the parishes enumerated in 22 *G.* 2. *c.* 47., and in the preamble, says, "And whereas it would greatly tend to the improvement and encouragement of trade in the said town and borough of *Southwark*, and the eastern half hundred of *Brixton*, and to the necessary support and protection of useful credit within the same, if the powers of the said court, under the said two recited acts of parliament, were extended to the recovery of small debts, not exceeding 5*l.*," and then enacts that "it shall and may be lawful for any person or persons," to sue, "whether residing within the said town and borough of *Southwark*, and the said eastern half of the hundred of *Brixton*, or elsewhere;" that is, elsewhere within the parishes before enumerated. We think this the true construction of the acts, and that in adopting it, we do not violate any principle, or impugn any decided case.

Rule discharged.

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HUDSON and Another v. MARJORIBANKS.

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Where the Plaintiff, in an action on a marine policy of insurance, having recovered for an average loss, obtained a new trial, the costs of the first trial being directed to abide the event, and at the second trial recovered again for no more than an average loss: Held, that he was entitled to the costs of one of the trials only, and the Defendant to the costs of neither.

THIS was an action on a policy of insurance against perils of the sea; and the only question between the parties was, whether the Plaintiffs were entitled to claim from the Defendant a total loss, with benefit of salvage, or an average loss only. At the *London* sittings after *Hilary* term, 1822, the jury found a verdict for an average loss only.

The Plaintiffs applied for a new trial, which was granted, and the costs of the first trial were ordered to abide the event. At the second trial, which took place at the sittings after *Michaelmas* term, 1822, the jury again found a verdict for an average loss only. The Plaintiffs taxed their costs in the present term, when the prothonotary allowed them their costs on one trial, but refused to allow the Defendant any costs on the other trial, unless the court should give an order to that effect. Previously to the two trials in which the Defendant was concerned, the same question upon the same loss had been tried in an action against another insurer, in which the Plaintiffs recovered for a total loss (a), but some additional facts had been proved on the part of the Defendant, in the actions to which he was a party.

Taddy Serjt. having obtained a rule, calling on the Plaintiffs to shew cause why the prothonotary should not tax the Defendant his costs for the first trial in *Hudson* v. *Marjoribanks*,

Vaughan Serjt., who shewed cause, objected, that no money had been paid into court, and that the prothono-

(a) *Hudson* v. *Harrison*, 3 *B.* & *B.* 97.

tary's

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tary's allocatur was, as the rule for the new trial required it should be, according to the event.

Taddy. As the Plaintiff sought by the second trial to recover more than he had recovered in the first, and as he failed in his object, the event was against him. To put any other construction on the word *event* in the rule for a new trial, would be a mockery of the Defendant, inasmuch as the question was not whether there had been *any* loss; for that was never disputed; but how much the Plaintiffs were entitled to recover; so that the Plaintiffs were, on both trials, secure of a verdict for *some* damages. But if the Defendant be holden to have succeeded on one of the trials, he is entitled to the costs of that one. *Chapman* v. *Partridge*. (a) The rule of both courts is, that where the same party succeeds on both trials, he is entitled to the costs of both. *Trelawny* v. *Thomas* (b), *Austen* v. *Gibbs*. (c) If the Defendant could have paid money into court he would therefore have been entitled to the costs of both trials; but money could not be paid into court, for the average was not adjusted; and the reasonable course under the present circumstances seems to be, that each party should have the costs of one trial.

The Court, however, said, they thought that justice had been done, and the rule was

Discharged.

(a) 2 *N. R.* 382. (b) 1 *H. Bl.* 641. (c) 8 *T. R.* 619.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Hilary Term,

In the Fourth and Fifth Years of the Reign of
GEORGE IV.

1824.

MEMORANDA.

ON the first day of this term Sir *Robert Gifford*, Knt. took his seat as Chief Justice of this court in the room of Sir *R. C. Dallas*, Knt., who resigned that situation in the preceding vacation; and on the 3d of *February*, in this term, Sir *Robert Gifford* was gazetted a peer by the style and title of Baron *Gifford* of *St. Leonard's* in the county of *Devon*.

Richardson J. was, by ill health, prevented from attending in court during the whole of this term.

Jan. 23.

DILLAMORE *v.* CAPON.

The Court will not rescind a rule on the ground that at the time of discussion the parties omitted to present to the notice of the Court a statute which might have affected its decision.

VAUGHAN Serjt. moved for a rule *nisi* to rescind the rule of this court made in the above cause on the last day of last term. The motion was made on the ground that the reason given for the decision in the case (*ante*, 391.) was opposed to the express provision of a clause in the statute of 32 *G.* 3. *c.* 6.; which had not been distinctly presented to the notice of the court. The clause is as follows: "Whereas doubts have arisen whether any person or persons inhabiting within the said limits, and indebted to persons who do not live within the same, are subject to the jurisdiction of the said court, be it enacted, that from and after the 5th *April*, 1759, all persons whatsoever inhabiting within the limits of the jurisdiction of the said court of requests, shall be, and are hereby declared to be subject to the process and jurisdiction of the said court for any debt or debts by them or any of them then or at any time or times thereafter owing to any person or persons, bodies politic or corporate, not exceeding the sum of 40*s.*, *although the plaintiff or plaintiffs* suing out such process *shall not inhabit or reside within the said borough of Southwark*, or any of the parishes mentioned in the said recited act, or the liberties or precincts thereof, any thing in the said former act contained to the contrary notwithstanding;" and *Vaughan* contended it was usual to reconsider a decision which had been erroneously pronounced in consequence of an omission to present to the court all the materials essential to the formation of an accurate judgment.

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But the Court declined taking into consideration the effect of the clause now cited, and refused to rescind the rule, upon the ground that the parties ought, on the former discussion, to have presented to the court every thing that they deemed essential to the support of their case. That however it might be open to other parties to question the correctness of any given decision, it would occasion unbounded inconvenience if the parties, who were themselves the objects of the decision, should, after their case had been deliberately discussed, attempt to open it again upon the ground of any oversight occasioned by their own neglect.

Rule refused.

Upon a subsequent day, *Park* J. said he had again examined all the statutes affecting the case, and particularly the clause above referred to, and that it would not in any way have affected the judgment of the court had it been pressed on their notice at the first discussion.

COBBOLD v. CASTON.

Jan. 24.

Held, that an agreement to procure coals at *B.* and convey them to *I.* need not be in writing under the statute of frauds.

ASSUMPSIT on the breach of agreements by the master of a ship to convey corn within a given time from *Ipswich* to *Hull*, and having delivered it at *Hull*, to fetch from the port of *Blyth*, and deliver to the Plaintiff at *Ipswich* a cargo of *Cowpermain* coals at 29*s.* per chaldron, to be paid on delivery thereof.

The six first counts of the declaration were confined to the agreement respecting the corn; the seventh, eighth, and ninth to the agreement respecting the coals.

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At the trial before *Burrough* J., *London* sittings after *Michaelmas* term last, it appeared that the agreements were oral, and the Defendant discharged himself of that which related to the corn, by shewing that stress of weather had prevented the performance of it; but on that which related to the coals the Plaintiff obtained a verdict.

Pell Serjt. now moved for a rule *nisi* to set aside this verdict, and enter a nonsuit, on the ground that the statute of frauds required that an agreement of this kind should be in writing. He cited *Garbutt* v. *Watson* (a) to shew that this case did not fall within the principle of those which had been holden not to be affected by the statute of frauds, because the goods which were the subject of agreement were not capable of immediate delivery. In *Garbutt* v. *Watson* there was an oral contract for a quantity of flour, which was not ground at the time of the contract; but *Bayley* J. said it was immaterial whether the flour was ground at the time or not: so, it was immaterial here whether the coals were at the time of the contract ready at the pit's mouth or not. If the Court should hold otherwise, a ready contrivance would be found for a complete evasion of the statute. A dealer, for instance, might orally contract to sell at *Deptford* and convey to *London*, and then urge that the stipulation for conveyance to *London* rendered it unnecessary to attest by writing the contract to sell.

Gifford C. J. I think this case does not fall within the provisions of the statute of frauds. This was not a contract by the Defendant to sell coals to the Plaintiff, but to provide them for him at *Blyth*, and afterwards bring them to *Ipswich*. Suppose he had

(a) 5 B. & A. 613.

found

found it impossible to procure the coals at *Blyth*, no action would have lain against him for breach of contract to deliver coals; and this distinguishes the present from all the cases in which there has been a sale by the Defendant. This was not a contract to sell, but to provide coals, and afterwards to carry them to *Ipswich*. I entertain no doubt on the point, and the verdict must stand.

PARK J. This falls within the distinction which has been taken in all the cases, and is not a contract for sale, so that the supposition which has been made of a sale at *Deptford*, accompanied with an agreement for conveyance to *London*, does not apply. The coals were not sold by the Defendant, but were to be procured by him.

BURROUGH J. There was no part of the bargain respecting the coals binding on the Defendant, but the agreement to bring them to *Ipswich*.

Rule refused.

SELLS *v.* HOARE and Others.

Jan. 24.

In an action for an excessive distress for rent, the Plaintiff need not allege or prove the precise amount of rent due.

It is no bar to such an action, that between distress and sale of the goods distrained, the parties come to an arrangement respecting the sale.

THIS was an action for an excessive distress for rent. In the principal count of the declaration, the Plaintiff averred that a small sum, to wit, 1*l.* 8*s.*, and no more being due, the Defendants had distrained for 95*l.* At the trial before *Burrough* J., *Middlesex* sittings after last term, the Defendants having succeeded in shewing that at all events 82*l.* 10*s.* was due, and also, that in conse-

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sequence of an arrangement between the parties, no sale of the goods distrained took place, the jury gave a verdict for the Plaintiff, damages only 1*s.*; and the learned Judge certified to deprive him of costs.

Vaughan Serjt., on the part of the Defendants, now moved for a rule *nisi* to set aside this verdict, and enter a nonsuit, on the ground, first, that the gist of the action being the excess of the distress, that excess could not be shewn till the Plaintiff first established what sum was actually due, and that therefore it was material for him to have shewn that 1*l.* 3*s.* was the sum due, although that sum had been mentioned under a *scilicet*. Secondly, that the action for an excessive distress would not lie, unless there had been a sale of the goods distrained; and that the sale having in the present instance been abandoned in consequence of an understanding between the parties, the Plaintiff ought to have been nonsuited.

A new trial was also prayed upon a question of fact, in case the rule should be refused as to the entering a nonsuit.

But, as to the first point, the Court was clearly of opinion, though the present action was vexatious and ought not to be encouraged, that it was not incumbent on the Plaintiff to prove as the sum really due for rent the precise amount stated in the declaration, the substantial allegation being, that more was distrained for than was actually due; and as to the second, that the arrangement between the parties respecting the sale of the goods distrained, did not divest the Plaintiff of his right of action.

Rule Refused.

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EDWARDS *v.* BELL and Others.

Jan. 27.

The declaration charged the Defendant with publishing the following libel against the Plaintiff, a dissenting minister. "A serious misunderstanding has recently taken place amongst the independent dissenters of *Great Marlow* and their pastor, in consequence of some personal invectives publicly thrown from the pulpit by the latter, against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously. *Bucks Chronicle.*"
The Defendant pleaded that the Plaintiff, whilst officiating as minister, published from a part of a chapel assigned to him as minister for the delivery of a sermon, to and in the presence of his congregation, of and concerning one *M. F.*, a teacher of a certain *Sunday* school, the scandalous words following: "I have something to say, which I have thought of saying for some time, namely, the improper conduct of one of the female teachers, her name is Miss *Fair*; her conduct is a bad example and disgrace to the school; and if any of the children dare ask her to go home, she shall be turned out of the school, and never enter it again. Miss *Fair* does more harm than good;" and thereby gave great offence to divers of the dissenters, to wit, one ——— and one ———, and occasioned a serious misunderstanding amongst the dissenters. Verdict for Defendant: Held, upon motion to enter a verdict for Plaintiff *non obstante veredicto*, that the plea was a sufficient answer to the libel charged.

CASE for a libel. The declaration, after an introductory statement, that the Plaintiff was a pastor or minister of certain dissenters at *Great Marlow*, charged the Defendant with having falsely, wickedly, and maliciously published of and concerning the Plaintiff as such pastor, a libel to the tenor and effect following:

"A serious misunderstanding has recently taken place amongst the independent dissenters of *Great Marlow* and their pastor, in consequence of some personal invectives publicly thrown from the pulpit by the latter, against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously. *Bucks Chronicle.*"

The Defendants, who were proprietors of the *Times* newspaper, pleaded, First, the general issue. Second, that before and at the time of the speaking and publishing the several scandalous words by the said

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Plaintiff, as hereinafter mentioned, one *Margaret Fair* did assist in the management and conduct of a certain Sunday school, and was a person of distinguished merit and spotless reputation, and that the Plaintiff, well knowing the premises, before the several times of printing and publishing the several supposed libels by the Defendants, as in the declaration mentioned, to wit, on the 6th of *April*, 1823, at *Great Marlow* aforesaid, just before his preaching and delivering a certain discourse or sermon, then and there by him, as such pastor or minister addressed and preached to a certain congregation of the said dissenters assembled for the purpose of (amongst other things) hearing the said discourse or sermon, in a certain chapel, and whilst he, the plaintiff, was officiating in the said chapel as pastor or minister, spoke and published from a certain part or station of the said chapel, assigned to him as pastor or minister for the preaching and delivery of the discourse or sermon, and to and in the presence of the congregation, of and concerning *Margaret Fair* these scandalous words following: "I have something to say which I have thought of saying for some time, namely, the improper conduct of one of the female teachers, her name is Miss *Fair*; her conduct is a bad example and disgrace to the school, and if any of the children dare ask her to go home, she shall be turned out of the school and never enter it again; Miss *Fair* does more harm than good;" and thereby then and there gave great offence to divers of the said dissenters, to wit, one *Joseph Wright* the elder, one *Joseph Wright* the younger, one *Samuel Washbourn*, one *William Wright*, one *Sarah Puddifant*, and one *Ann Jaques*, and occasioned a serious misunderstanding amongst the said dissenters in the declaration mentioned; wherefore the Defendants did afterwards, to wit, at the several times when, &c. in the declaration mentioned, print and publish the supposed libels in the declaration mentioned, as they lawfully might, for the cause

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said aforesaid, which are the same printing and publishing the supposed libels in the declaration mentioned, and this they are ready to verify, &c. There were other pleas to the same effect, upon which issue was joined.

At the trial before *Burrough* J., *London* adjourned sittings after *Trinity* term last, a verdict having been found for the Plaintiff on the general issue, with 40*s.* damages, and for the Defendants on the special pleas,

Pell Serjt. in the last term obtained a rule *nisi*, to enter up a verdict for the Plaintiff, notwithstanding the verdict found for the Defendants on their special pleas, on the ground that the pleas were no answer to the charge in the declaration.

Vaughan and *Taddy* Serjts. now shewed cause. The plea supports in substance all that is stated in the alleged libel, and the Plaintiff cannot recover unless he shows that the Defendants' publication contained a wilful and malicious misrepresentation of the expressions used by the Plaintiff. In *Lewis* v. *Clement* (a), the Defendant, in addition to stating the Plaintiff's proceedings, characterised them with a heading of his own, "Shameful Conduct of an Attorney;" but here the libel simply charges the Plaintiff with the fact of having employed personal invective, and the plea supports the charge by setting out the language used. This was the only course the Defendants could take, for it would not have been permitted them, in general terms, to affirm the libel. *I'Anson* v. *Stuart* (b), *Holmes* v. *Catesby* (c) It is sufficient if the words set out in the plea support the substance of the charge contained in the libel. *Woolnoth* v. *Meadows* (d), and those words clearly constitute personal invective.

[illegible]
(b) 1 T. R. 748. (d) 5 East, 463.

Pell

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Pell and *Peake* Serjts. in support of the rule argued, that the words set forth in the plea made out a charge, differing in the following respects from that conveyed in the libel: First, it must be inferred from the libel, that, in consequence of what had occurred, a misunderstanding arose between the dissenting minister and his congregation; whereas, by the plea it is alleged, that the misunderstanding existed only *amongst* the congregation, in consequence of what had occurred, and not between them and their pastor. Secondly, it must be inferred from the libel that the invective in question was delivered from the pulpit in the course of a sermon, whereas, according to the plea, it was delivered previously to the sermon. Thirdly, the plea contains no notice or justification of the imputation conveyed by the last words of the libel, that the matter was to be taken up seriously. Those words are a gratuitous comment upon the occurrence by the editor, and fall within the objection raised in *Lewis* v. *Clement*. The case of *Woolnoth* v. *Meadows* turned on the accuracy of the words of the libel, and not on the precision requisite in a justification. Fourthly, the language employed by the Plaintiff was not invective, but merely an objection to the course pursued by Miss *Fair*.

Gifford C. J. This was a motion to enter up a verdict for the Plaintiff in an action for a libel, notwithstanding a verdict found for the Defendants, upon pleas justifying the libel. The Plaintiff states himself to be the pastor or minister of certain dissenters, and, after the usual introductory matter, that he was of good character, and had never been guilty of the misconduct imputed to him, alleges, that the Defendants, who are the proprietors of the *Times* newspaper, published a libel against him in these words: "A serious misunderstanding has recently taken place amongst the independent dissenters of *Great Marlow* and their pastor, in conse-

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quence of some personal invectives publicly thrown from the pulpit by the latter against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously. *Bucks Chronicle.*" Undoubtedly the gist and sting of the charge contained in these words, is, that the Plaintiff, by pouring forth scandal and invective from the place usually devoted to moral and religious instruction, had occasioned a misunderstanding between himself and his congregation, and that the matter was to be taken up seriously. This is, indeed, a grave charge, but the Defendants justify it as follows: "That the Plaintiff, just before the preaching and delivering a certain discourse or sermon by him as pastor or minister, addressed to a certain congregation of dissenters, assembled for the purpose of (amongst other things) hearing the said discourse or sermon in a certain chapel, and whilst he the Plaintiff was officiating in the said chapel as pastor or minister, spoke and published, from a certain part or station of the said chapel assigned to him as pastor or minister for the preaching and delivery of the discourse or sermon, and to and in the presence of the congregation, of and concerning *Margaret Fair*; these scandalous words following: "I have something to say which I have thought of saying for some time, namely the improper conduct of one of the female teachers, her name is Miss *Fair*, her conduct is a bad example and disgrace to the shool; and if any of the children dare ask her to go home she shall be turned out of the school, and never enter it again. Miss *Fair* does more harm than good:" And then they allege, that the Plaintiff thereby gave great offence to divers of the dissenters, to wit, &c., and occasioned a serious misunderstanding amongst the said dissenters. Now the first objection to the strict relevancy of this justification is, that the charge in the libel implies an invective uttered by the Plaintiff in the

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course of a sermon. I do not understand the libel to convey any such meaning; not that it would make any great difference if the fact were so; but the charge is, that the Plaintiff delivered personal invectives from the pulpit, and this is also the statement contained in the plea. Has the Plaintiff then uttered personal invective? If I understand what is meant by personal invective, he could scarcely have employed stronger language for that purpose. "Her conduct is a bad example and disgrace to the school." And not content with that, he goes on to say, "Miss *Fair* does more harm than good." These expressions clearly constitute personal invective. It is true that the libel ascribed to the Defendants in the declaration goes on to say, "It is understood the matter is to be taken up seriously;" but the gist of the libel is, the charging the Plaintiff with having delivered invectives from the pulpit. It has also been urged that the allegation that "the matter was about to be taken up seriously," implies that charges were about to be preferred against the Plaintiff by his congregation, and that the justification contains no answer to this part of the libel. I do not see that the allegation necessarily conveys any such meaning; it is only alleged as that which naturally followed upon the Plaintiff's conduct on the occasion in question; and the charge on the subject of his conduct is substantially met and answered in the justification. It has further been objected, that the libel alleges a misunderstanding to have arisen between the pastor and his congregation, while the justification alleges the misunderstanding to have existed only amongst the congregation: but even in that respect the plea substantially supports the statement contained in the libel, and the rule which has been obtained for the Plaintiff must, therefore, be discharged.

PARK J. The charge complained of in this declaration, is, that the Plaintiff had been guilty of pronounc-

ing

ing a personal invective from the pulpit; and it would have been no answer if the Defendants had merely re-affirmed this in the plea; they are therefore obliged to particularise, and they say, that the Plaintiff, whilst officiating as minister, published from a part of a chapel assigned to him as minister for the delivery of a sermon, to and in the presence of his congregation, of and concerning one *M. Fair*, a teacher of a certain *Sunday* school, the scandalous words set forth in the sequel. It was not necessary for them to say that this took place in the course of a sermon; no such allegation was contained in the libel complained of; but the expressions they have particularized are clearly personal invective of a very serious cast. As to the allegation touching the misunderstanding between the congregation and their pastor, the gist of it has been completely met in the language of the plea, and the statement that the matter was to be taken up seriously, though part of the publication complained of, can scarcely be termed libellous.

BURROUGH J. No person can use the pulpit for the purpose of invective against individuals, and the Defendants were entitled to justify in this action, by shewing that what they had alleged against the Plaintiff in that respect was borne out in fact. In such a case it is sufficient if the substance of the libellous statement be justified; it is unnecessary to repeat every word which might have been the subject of the original comment. As much must be justified as meets the sting of the charge, and if any thing be contained in a charge which does not add to the sting of it, that need not be justified. In the present case the Defendants have in effect justified all they asserted in the libel complained of, and the rule must therefore be

Discharged.

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Jan. 29.

DODINGTON v. HUDSON.

Where Defendant was served with an order of court to reinstate forthwith premises belonging to the Plaintiff: Held, that an attachment could not issue against him for disobedience of the order, unless the service of it was accompanied with an oral demand of performance.

THE Defendant, under an agreement entered into at the trial of the cause, had been served with an order of court to reinstate forthwith premises of the Plaintiff which the Defendant had injured, by pulling down an old partition and encroaching on them by a new one. On serving the order of court, the Plaintiff's agent omitted to demand orally of the Defendant a compliance with the terms of the order.

A rule *nisi* for an attachment having been obtained in consequence of the Defendant's non-compliance,

Vaughan and *Taddy* Serjts. insisted that the Defendant could not be in contempt unless an oral demand of compliance had been made; and they cited *Brandon* v. *Brandon*. (a)

Pell and *Peake* Serjts. in support of the rule *nisi*, admitted, that by the general rule a demand was necessary before a party could be in contempt for disobedience to an order of court; but they contended, that a case like the present must form an exception to the general rule, which applied chiefly where the wilful disobedience to the order of the court could not be complete without the intervention of two parties; as in the instance of an order to pay money at a given time or place, where there must be a receiver as well as a payer. So that, unless the receiver were present to demand compliance with the terms of the

(a) 1 *B. & P.* 394.

order,

order, no contempt could be committed; but in the present instance, the order was to be executed *forthwith*, and the house was always ready to receive the reinstatement required, so that the service of the order was in itself as complete a demand as the nature of the case admitted.

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GIFFORD C. J. All the authorities shew that before an attachment can be enforced, the party proceeded against must be proved to have committed a wilful disobedience of the order of court: as in the case where a party engaged to pay money at a coffee-house between the hours of ten and twelve, he was bound to be there within the appointed time, and if he failed he could have no defence against an action; but the law being otherwise with respect to an attachment, *Eyre* C. J. with great reluctance refused to compel performance by that means, considering the practice imperative which requires personal service of the rule, and a personal demand and refusal before the party can be deemed in contempt. It has been forcibly argued in the present case, that the analogy between an order for payment of money and an order for the repair of an edifice, is not complete, and that the reasons which make a demand essential in the one case do not exist in the other; but the difficulty I feel is, that in order to justify an attachment some wilful disobedience of the order of Court must be shewn. I think, therefore, that the party moving for an attachment should have requested the Defendant to set about the work, and he might then perhaps have alleged some excuse for not proceeding to immediate performance. With great reluctance we feel ourselves bound to discharge this rule, though under the circumstances of the case, without costs.

PARK J. When I look at the case of *Brandon* v. *Brandon*, and see the reluctance which *Eyre* C. J. overcame,

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overcame, in order to conform to the general rule I am afraid to act contrary to that decision, because it is safer in proceedings of a criminal nature to adhere to the strict practice of the Court. I think, therefore, though there has been much vexation in this case, the present rule must be discharged.

BURROUGH J. This being a criminal proceeding, wilful disobedience of the order of court must be established before an attachment can issue.

Rule discharged without costs.

The reason assigned by the Defendant for resisting the order of Court, was, that the partition he had pulled down having been erected previously to the passing of the building act, and in a manner inconsistent with the provisions of that act, the Defendant could not reinstate it, that is, restore it to exactly its former condition, without a violation of the provisions of that act.

But the Court were clear, that under the order to *reinstate*, the Defendant was bound to erect a new partition conformably to the provisions of the building act, the increased expence of such a mode of erection having been cast on him by his own conduct.



(IN THE EXCHEQUER CHAMBER.)

WATKINS *v.* FLANAGAN.

Jan 29.

A surety under an annuity-deed, who has redeemed the annuity subsequently to the bankruptcy and certificate of the grantor, may maintain an action against the grantor for the sum paid on account of redemption, although the grantee may have proved the value of the annuity under 49 *G.* 3. *c.* 121. *s.* 17.

ERROR from the Court of King's Bench. The declaration was in debt on an annuity bond, to which there were several pleas and demurrers. The question arose upon the effect of the eighth and seventeenth sections of the statute 49 *G.* 3. *c.* 121., and the facts upon which it turned may be thus collected from the pleadings. On the 5th *March*, 1811, the Plaintiff below, as surety for the Defendant below, joined with him in the execution of an indenture, whereby the Defendant below granted an annuity of 300*l.* *per annum* to *James Martin*, and also a warrant of attorney to confess a judgment for securing the payment of the annuity. By this indenture the annuity was made redeemable by the Defendant below and Plaintiff below, or either of them, if they, or either of them, should deem it expedient, on payment of the sum of 2175*l.* with such arrears as might happen to be due. The Defendant below executed a bond to Plaintiff below of the same date, wherein the indenture was recited, and of which the condition was, that the Defendant below should keep the Plaintiff below harmless and indemnified from the payment of the annuity, and all loss, damages, and expences, and from all the covenants, conditions, provisoes, declarations, and agreements in the indenture and warrant of attorney contained, and from the payment of all sums of money to grow due thereon, or become payable in respect or by virtue thereof, and from all actions, &c. The Defendant below became bankrupt in *November*, 1812, and obtained his certificate in *January*, 1813. *Martin*

 proved,

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proved, under the commission, the arrears then due, and also proved, in virtue of the seventeenth section of the said statute, the value of the annuity ascertained as therein directed, and the value so proved exceeded the sum of 2175*l*. This proof was made without communication with the Plaintiff below. After this proof, and after the Defendant below had obtained his certificate, but before a final dividend had been made of his effects, the Plaintiff below, for his own sake, redeemed the annuity according to the terms of the deed; and now brought this action to recover from the Defendant below the sums paid for the redemption and arrears. Various breaches of the condition of the bond were assigned; the first, for non-payment of a sum advanced to cover arrears due before the bankruptcy; the others, for non-payment of arrears accruing subsequently, and of a sum advanced by the Plaintiff below to redeem the annuity. The Defendant below pleaded his bankruptcy and certificate generally and specially.

To these pleas there was a demurrer and joinder in demurrer, upon which the Court below gave judgment for the Defendant below as to the first breach of the condition of the bond, and for the Plaintiff below upon the other breaches.

Platt, for the Plaintiff in error. Demands proveable under a commission of bankrupt being barred by the bankrupt's certificate, if the Plaintiff below could have proved under the commission of the Defendant below the demand made under the various breaches of condition subsequent to the first, the certificate of the Defendant below is a bar to that demand. Whether or no the Plaintiff below could have so proved, must depend on the construction to be put on the 49 *G.* 3. *c.* 121. By the eighth section of that statute, any person who shall be surety for, or be liable for any *debt* of the bankrupt, and who shall have *paid the debt*

 (even

(even after the commission shall have issued,) may, if the creditor shall have proved his debt under the commission, stand in the place of the creditor, as to the dividends upon such proof; and if the creditor shall not have proved, such surety may prove his demand in respect of such payment, as a debt under the commission. Now the Court below, in holding that the plaintiff below, by redeeming as a surety the annuity granted by the bankrupt, did not pay any *debt* of the bankrupt, and therefore could not prove such payment under the bankrupt's commission, have put too narrow and technical a construction upon the word *debt*, which, with a view to the beneficial operation of the statute in favour of the bankrupt, must be taken to mean any charge or incumbrance to which he was subject. That the annuity with which the bankrupt was charged was equivalent to a debt, and that the redeeming it, had the same effect as paying off a debt, is manifest from the circumstance that, after the surety had redeemed the annuity, the grantee could no longer have any claim against, or receive any dividend out of the bankrupt's estate; but the surety who had so far relieved the bankrupt's estate of a claim against it, ought in justice to be entitled to prove a debt to the same amount; and taking the whole clause of the act of parliament together, this appears to have been the intention of the legislature.

Admitting, however, that the Plaintiff below could not prove under the commission the sum he had paid for redeeming the annuity, still, if the grantee of the annuity, by electing to prove under the commission, has discharged the bankrupt from all future demands in respect of the annuity, his accessory demand against the Plaintiff below, as surety, follows the event of the principal demand, and like that falls to the ground; whatever, therefore, the surety after this pays the grantee in respect of the annuity, he pays in his own wrong, and cannot claim it again at the hands of the bankrupt.

 Now

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Now the grantee, by electing to prove under the commission the value of his annuity pursuant to the seventeenth section of 49 *G. 3. c.* 121., does, under the express words of that section, thereby discharge the bankrupt, if he obtains his certificate, from all demands whatever in respect of such annuity; and the fourteenth section contains an enactment which precludes a party from proceeding in an action where he has elected to prove under a commission.

If it should be argued, that the discharge of the bankrupt and of the principal demand does not necessarily, and in all cases, discharge the surety and the accessory demand, at least it may be contended, that it has this effect under the circumstances of the present case.

First, because the bankrupt's estate being burthened with the demand arising out of the grantees proving the value of his annuity under the commission, and the surplus of the bankrupt's estate, if any, being diminished to that extent, the benefit which the grantee may derive from the proof ought not to exceed the burthen imposed; with the advantage of proof, whatever it may be, he must take the disadvantage of foregoing all further claim against the bankrupt, and must be satisfied with obtaining the same proportion of his claims as the other creditors. But if after such proof the grantee has any further claim in respect of the annuity, and the surety is justified in paying it off, the surety may afterwards recover from the bankrupt the amount paid, notwithstanding the proof by the grantee; which amounts to the same thing as if the grantee, after proof under the commission, were himself to claim and obtain the amount from the bankrupt.

Secondly, it may be urged that the surety had no right to redeem the annuity without the consent of the grantor, notwithstanding the language of the indenture recited

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recited in the condition in the bond, that the annuity should be redeemable by the said *George Watkins* and *Lewis Flanagan*, or either of them, if they, or either of them, should deem it expedient, for the sum of 2176*l*. For the obvious inference from every annuity transaction, and thence the intent of the parties, is, that the grantor should hold the purchase-money, and that it is less inconvenient to him to pay the annuity than to dispense with the capital, for which he pays it. Admitting, however, that the surety might redeem the annuity without the consent of the grantor, the grantee, by proving under the commission, has rendered redemption impossible: after he has elected to take the value of the annuity, the original purchase-money no longer constitutes the sum to which he is entitled, and the surety can fix on no other sum in lieu of it.

The cases which have been decided are distinguishable in point of fact from the present, and are consistent with the principles now contended for. In *Welch* v. *Welch* (*a*), the grantee of the annuity never elected to prove under the commission. In *Newington* v. *Keeys* (*b*), bail, who had been obliged to pay the amount of a judgment against their principal, were held entitled to recover the same amount against him after he had obtained his certificate under a commission of bankrupt; but the judgment not having been obtained before the commission issued, no debt existed which the bail could prove, nor was it certain that the principal would lose in the action, or that any debt would ever be established against him.

In *Inglis* v. *M'Dougal* (*c*), the assignees of a bankrupt having elected not to take a lease belonging to the bankrupt, sued the bankrupt's surety upon breaches of cove-

(*a*) 4 *M. & S.* 333.

(*b*) 4 *B. & A.* 493.

(*c*) 1 *B. M.* 196. 8 *Taunt.* 584.

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nant arising after the bankruptcy, and the surety in turn was held entitled to recover against the bankrupt, notwithstanding his certificate, for the claim against him had never been proved under the commission. But, in *Linging* v. *Comyn* (a), where the Plaintiff had proved his debt under a commission against the Defendant, it was holden he could not sue the bail; and *Holmer* v. *Viner* (b), and *Stock* v. *Moss* (c), are in point for the Defendant below.

In *Martin* v. *Brecknell* (d), and the class of cases of the same kind, the sum proved under the commission and claimed of the surety, was a sum ascertained by bond, so that the surety had a fixed and precise demand against his principal; but where, as in the present case, the creditor has elected to prove for the value of an annuity, it is impossible for the surety to ascertain what sum the creditor is entitled to receive at his hands.

Evans, for the Defendant in error. In a case like the present the principal is liable for any loss which may have been incurred on his behalf by his surety, although he may be discharged as against the original creditor (*Per Gibbs* C. J. and *Dallas* J., in *Inglis* v. *M'Dougal*.) And proof by the creditor under the commission, even though he may have received a dividend, does not preclude him from resorting also to the surety. *Martin* v. *Brecknell*. *Ex parte Dewes*. (e) *Soutten* v. *Soutten*. (f) *Meade* v. *Braham*. (g) The creditor, indeed, has no election, but is bound to prove; and as to the objection that the surety had no authority under the deed to redeem the annuity, the contrary appears by the express terms of the deed. The only question

(a) 2 *Taunt*. 246.
(b) 1 *Esp. N. P. C.* 13.
(c) 1 *B. & P.* 286.
(d) 2 *M. & S.* 39.
(e) 5 *B & A*. 482.
(f) *Ibid*. 882.
(g) 3 *M. & S.* 91.

is,

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is, whether the bankrupt is, by his certificate, discharged from all claims, in respect of the annuity, under the operation of 49 *G.* 3. *c.* 121. That he is not discharged in every possible case appears from *Hewes* v. *Mott* (*a*); and in the present case he cannot be discharged, unless the surety could prove under the 8th section of 49 *G.* 3. *c.* 121. Now under that section the surety could prove nothing besides a debt; but though the arrears of the annuity may constitute a debt, a sum paid voluntarily for redemption, which redemption the grantee could never compel, is a means by which the surety avoids further charge, but is no debt. On principle, therefore, it is clear that the bankrupt was not discharged; and the decisions are all in favour of this proposition. *Welch* v. *Welch*. *M'Dougal* v. *Paton*. (*b*) *Hoffham* v. *Foudrinier*. (*c*)

Platt having been heard in reply,

GIFFORD C. J. delivered the judgment of the Court.

This was an action brought by *Lewis Flanagan*, on a bond, bearing date *March* 5, 1811, for the payment of 4200*l.*; and the condition, after reciting an indenture whereby it was covenanted that *George Watkins* should pay an annuity to *James Martin*, was, that if the said *George Watkins* should at all times save harmless and indemnified the said *Lewis Flanagan* from the payment of the annuity, and from the payment of extra premium for insurance, loss, costs, charges, damages, and expences, and also from the covenants, conditions, provisos, declarations, and agreements, in the recited indenture contained, and from the payment of all sums thereafter to grow due thereon, and from all actions, loss, costs, charges, damages, and expences whatsoever,

(*a*) 6 *Taunt.* 329. (*b*) 8 *Taunt.* 584. (*c*) 5 *M. & S.* 22.

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which the said *Lewis Flanagan* might sustain by reason of the non-payment of the annuity, or of the extra premium, or by reason of the said *Lewis Flanagan* having executed the deed, or in anywise however relating thereto, then the obligation to be void.

The declaration goes on to allege the various covenants and provisos contained in the indenture, and assigns several breaches. The first alleges the non-payment of a sum of 300*l.* on the 5th of *March*, 1813, whereby the Plaintiff was obliged to pay it.

The third breach is that the Defendant having become insolvent and unable to pay the annuity, it became expedient, and that the Plaintiff did redeem and repurchase it at the price of 2925*l.*, and in so doing incurred costs and charges to the amount of 500*l.*

It is not necessary for me to enumerate the various pleas, which state in substance, that *Watkins* having become bankrupt, and having obtained his certificate, and *Martin* having proved under the commission the value of the annuity, *Watkins* is thereby discharged.

I lay the first breach out of the question, because there is no complaint as to the judgment of the court below on that head. It is admitted that the arrears of the annuity due at the time of the bankruptcy constitute a debt which the surety might prove, and against which the certificate operates as a bar. The question now raised is, as to the subsequent arrears, and the sum paid for redemption of the annuity. It is admitted, that but for the 49 *G.* 3. c. 121., *Watkins* would not be discharged, and the dispute turns on the construction to be put on that statute. The section under which the surety is permitted to prove is the eighth, by which it is enacted, "That in all cases of commissions of bankrupt already issued, under which no dividend has yet been made, or under which the creditors who have not proved can receive a dividend, equally in proportion to their

respective

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respective debts, without disturbing any dividend already made, and in all cases of commissions of bankrupts hereafter to be issued, where at the time of issuing the commission any person shall be surety for or be liable for any debt of the bankrupt, it shall be lawful for such surety or person liable, if he shall have paid the debt, or any part thereof, in discharge of the whole debt, although he may have paid the same after the commission shall have issued, and the creditor shall have proved his debt under the commission, to stand in the place of the creditor, as to the dividends upon such proof, and when the creditor shall not have proved under the commission, it shall be lawful for such surety or person liable, to prove his demand in respect of such payment, as a debt under the commission, not disturbing the former dividends, and to receive a dividend or dividends, proportionably with the other creditors." Was this a debt, then, which, if it had not been proved by the grantee, could have been proved by the surety? In order to determine that, we must see what the seventeenth section of the statute permits the grantee to do. Before that statute the grantee could not prove under a commission the value of an annuity, except where it was secured by bond. The seventeenth section of that statute enacts, "That it shall be competent to any annuity creditor of any person against whom a commission of bankrupt shall issue after the passing of this act, whether the same shall be secured by bond or covenant, or bond and covenant, or by whatever assurance or assurances the same shall be secured, and whether there shall or shall not be or have been any arrears of such annuity at or before the time of the bankruptcy, to prove under such commission as a creditor for the value of such annuity, which value the commissioners shall have power and are hereby required to ascertain; and the certificate of every bankrupt under whose commission such proof

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shall be or might have been made, shall be a discharge of such bankrupt against all demands whatever, in respect of such annuity, and the arrears and future payments thereof, in the same manner as such certificate would discharge the bankrupt with respect to any other debt proved, or which might have been proved under the commission.

We were pressed in argument, that coming in under the commission is the voluntary act of the annuity creditor; but this is not exactly so, because if he does not come in, his debt is barred under the certificate. It is clear the annuity creditor ought to prove; but could the surety have come in and proved the value, if the annuity creditor had omitted to do so? There are no words to that effect in the eighth section of the statute; that section permits the surety to prove a debt, but the value of an annuity is not a debt: how then could the surety prove the value? and yet it is only where he can come in and prove that the bankrupt is discharged as against him.

As to the argument that it was not compulsory on the surety to redeem the annuity, and that he having done so in his own wrong, the bankrupt is not liable to reimburse him, the answer lies in the language of the indenture, by which it is expressly permitted to the surety to redeem if he should find it expedient to do so; and it can scarcely be contended, that, under the circumstances, it was not expedient both for him and for *Watkins* that the annuity should be paid off.

Judgment below affirmed.

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CAPON *v.* DILLAMORE.

Jan. 31.

Bail: indemnity by attorney, what amounts to.

UPON opposition to a bail in error in this case, it was elicited from him that he did not know the Plaintiff in error; that he had become bail at the request of Plaintiff in error's attorney, with whom his son had had a conversation, in which the attorney said, that if his father became bail he should come to no harm; this the bail said he believed, though he had determined to become bail before he was requested to do so by the attorney.

The Court held that, under these circumstances, the bail must be rejected, and they refused to allow further time.

The KING *v.* The Sheriff of WILTS,

Jan 31

In the Cause, MILLER *v.* BRIDGES.

The writ was returnable on the morrow of *All Souls*. The Defendant surrendered to the sheriff's officer on the 3d of *November*, and to prison on the 5th. The Plaintiff issued a rule for bringing in the body, to which the sheriff returned *cepi corpus et paratum habeo*. An attachment having thereupon been directed against the sheriff, the Court set it aside on payment of all costs.

ATTACHMENT against the sheriff for not bringing in the body. The writ was returnable on the morrow of *All Souls*; the party surrendered to the sheriff's officer on the 3d of *November*, and to the county prison on the 5th. The sheriff had returned to a rule for bringing in the body, *cepi corpus et paratum habeo*.

Peake

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The KING
v.
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Peake Serjt. obtained a rule *nisi* to set aside this attachment on payment of costs, and to amend the return according the fact. He accounted by affidavit for the delay in making the motion, and contended, that though the return was on the essoin day, a surrender before the first day of term for actual business was sufficient. *Clinton* v. *Howard*. (a)

Vaughan Serjt. shewed cause, but the court upon payment of all costs, as between attorney and client, made the rule

Absolute.

(a) 10 *East*, 100.

Jan 31.

COLES *v.* GUM.

Where Defendant, whose name was *John Thomas*, had been arrested as *James Thomas*, and signed a bail-bond as *J. T.*, the Court, notwithstanding such signature, set aside the bail bond.

THE Defendant, whose name was *John Thomas Gum*, had been arrested as *James Thomas Gum*, and had signed a bail-bond "*J. T. Gum.*"

Upon a motion by *Taddy* Serjt. to set aside the bail-bond, on the ground that the arrest was irregular,

Vaughan Serjt. contended, that the signature of the bail-bond was conclusive against him; but the Court held, that the signature of a bail-bond, under these circumstances, was no waiver of the irregularity, and made the

Rule absolute.

1824.

Lord ELLIOTT, Vouchee.

Jan. 31.

Recovery. Amendment by altering the name of a parish, refused, where another parish appeared in the deed, though there was strong evidence to shew that the lands in the recovery lay in the parish proposed to be inserted.

CROSS Serjt. moved to amend a recovery, by altering the parish in which the land was described to be situated, the deed to lead the uses having described it to lie in a parish in which it was not situated. He adduced affidavits to shew in what parish the land described in the recovery was situated, and urged that the Court would make the requisite amendment, if they had evidence to satisfy them of the identity of the property in question, which, in the present instance, was minutely described in the recovery and the affidavits. He cited *Henzel* v. *Lodge* (a), and 1 *Wms. Saund.* 94 *a.*

GIFFORD C. J. In that case the Court would have refused the application, though the lands were distinctly enumerated in a schedule annexed to the deed, had not the deed contained, in addition to the parishes mentioned, the words "or elsewhere," under which the Court thought they might introduce the parish required. Here there is no such expression in the deed, nor any thing by which the proposed amendment can be made.

Amendment refused.

(a) 2 *Bl. Rep.* 747.

1824.

Feb. 4.

Cooper, Assignee of Patrick Kenifeck, a Bankrupt, *v.* Machin and Another.

The depositions taken upon a commission of bankrupt are not conclusive evidence under 49 *G.* 3. *c.* 121. of a petitioning creditor's debt.

THIS was an action of trover by the assignee, to recover property which had belonged to the bankrupt.

At the trial before *Burrough* J., *Middlesex* sittings after *Trinity* term last, the Defendants having pleaded the general issue, and given no notice of an intention to dispute the validity of the commission, the only proof adduced of the petitioning creditor's debt was the deposition on which the commission was grounded, and which stated the defendant to be indebted to the petitioning creditor in the sum of 391*l.* 10*s.* 1*d.* as the drawer of a bill of exchange, due 12th of *March*, 1821, but did not state that the drawer had had any notice of the dishonour of the bill, or even that it had been dishonoured by the acceptor *William Kenifeck.* The commission was sued out after the bill became due, upon an act of bankruptcy committed the 23d of *January* before.

This proof being objected to as insufficient, and the Plaintiff having failed in an attempt to complete it, the Plaintiff was nonsuited, with liberty to move to set the nonsuit aside, and enter a verdict for the Plaintiff for 180*l.*, or have a new trial if the court should think fit. Accordingly,

Vaughan Serjt. obtained a rule to this effect, on the ground that under the 49 *G.* 3. *c.* 121. *s.* 10. the proceedings under the commission are to be taken as evidence of the petitioning creditor's debt, where notice is not given

that

that it is intended to dispute the validity of the commission.

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Pell Serjt. who shewed cause, argued, that the effect of that statute was only to make the depositions admissible evidence of the facts which they appeared to attest; but whether or no the facts so attested would constitute a petitioning creditor's debt, would remain subject to dispute just as much as if those facts had been proved at the trial by evidence of the ordinary description, and that the facts contained in this deposition did not constitute a debt on the part of the drawer of the bill, there being no allegation of notice of dishonour, or even that the bill had been presented for acceptance: though an affidavit, couched in the terms of the present, might be sufficient for the preliminary purpose of an arrest, yet at the trial the holder could never recover against a drawer, unless dishonour of the bill were proved, and that notice of that dishonour had been given to the drawer.

Vaughan Serjt. in support of the rule, argued that the very object of the statute was to save the necessity of extrinsic proof, and to make the positive affidavit of debt by the petitioning creditor sufficient evidence of such debt. He cited *Exp. Douthat* (a), to shew that presentment of the bill and notice of dishonour was unnecessary where the drawer was a bankrupt.

LORD GIFFORD C. J. This was an action of trover to try the validity of a commission of bankrupt. No notice was given of any intention to dispute the petitioning creditor's debt, and consequently the proceedings under the commission were admissible under

(a) 4 *B. & A.* 67.

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the statute 49 G. 3. c. 121. But those proceedings cannot support such an action as the present, unless it clearly appear upon the face of them that there was a petitioning creditor's debt and an act of bankruptcy. It has been holden, indeed, that the deposition of the petitioning creditor himself may be received, but still a good petitioning creditor's debt must appear, and the act of parliament does not preclude the assignees from resorting to the ordinary kind of evidence. What is the case here? the petitioning creditor's debt is stated to be a bill of exchange drawn by *Patrick Kenifeck*, and directed to *William Kenifeck*. It is not necessary to touch on the case of *Ex parte Douthat*, because the decision there turned on the acts of 7 G. 1. and 5 G. 2., and the question was, whether the holder of a bill might sue out a commission on it before it arrived at maturity. But where the bill has arrived at maturity, it is always necessary, in order to constitute a debt as against the drawer, to prove that the bill was dishonoured by the acceptor, and that the drawer had notice of the dishonour. The present commission was sued out on a bill against the drawer, but there is not a word in the deposition about presentment or notice: without this, the deposition is not sufficient evidence of a debt. An affidavit to hold to bail is a mere preliminary proceeding, but to support a commission of bankrupt, there must be the same amount of evidence as would be requisite to support an action. On these depositions there is no evidence to that extent, and the parol testimony adduced in the cause did not supply the deficiency.

PARK J. If, previously to the passing of 49 G. 3. c. 121., the assignees had sued for a debt due to the bankrupt, and had commenced by attempting to prove the bankruptcy, it would not have been sufficient merely

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to prove the bankrupt's handwriting as the drawer of a bill of exchange, but they must have also proved the dishonour of the bill and notice of that dishonour. What then does the statute 49 G. 3. enact? that, "in any action to be brought by or against any assignee of any bankrupt, the commission of bankrupt, and the proceedings of the commissioners under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt, unless the other party in such action shall give notice in writing, that he intends to dispute such matters or any of them." The act never meant that the depositions should, under all circumstances, be conclusive evidence of a petitioning creditor's debt, but merely that they should be admissible for, as much as they profess to attest, and the party is not precluded from adducing other evidence. Unless it was intended by the act to exclude all other evidence besides the depositions,— which clearly it was not,— the petitioning creditor's debt in this case has not been established.

BURROUGH J. I decided at *Nisi Prius* on the language of the act of parliament, which is very peculiar, and which never intended to make the proceedings under the commission conclusive evidence of all the facts essential to constitute a bankruptcy. No debt appears on the face of the depositions produced at the trial, nor was any established by additional parol testimony.

Rule discharged.

Feb. 3.

SAVAGE v. HALL.

Bail. Householder, who.

UPON examination of one of the bail in this case, it appeared, he lived in lodgings, but that he paid part of the rent and taxes of a house occupied by his partner as a tea-dealer.

Pell Serjt. opposed his justification, on the ground that he was not a householder.

But the Court referred to *Hemming* v. *Plenty* (a), in which the circumstances were similar, and the bail was Allowed

(a) 1 *B. M.* 529

HEATH v. HARRIS.

Bail. Notice for a *dies non*.

NOTICE of justifying bail was given for the 2d of *February*, which was a *dies non*; on the bail presenting themselves this day, the officer of the court objected, that the notice ought to have been for the third.

Cross Serjt., for the bail, observed, that in such case the bail bond might have been assigned, and that in the King's Bench a justification on the third would have been regular under such circumstances.

The Court, however, refused to allow the bail, but offered to give time on a proper affidavit being filed.

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HOLMES, Administrator of HOLMES, *v.* MURCOTT. *Feb.* 4.

Where Defendant, after verdict applied for his discharge under the Insolvent Debtors' Act, and was sentenced to eighteen months imprisonment: Held, that though no further proceedings had been taken, the death of the Plaintiff did not entitle the Defendant to be discharged at his suit.

AFTER verdict at the *Lent* assizes, 1823, and before judgment was entered up, the Defendant, in this cause, gave the Plaintiff notice that he intended to apply to the Insolvent Debtors' Court for his discharge, under the Insolvent Debtors' act. That court, on the 24th of *June*, 1823, adjudged him to eighteen months imprisonment for fraud, "at the suit of some one or more of his creditors." In *October* last the Plaintiff died, and administration was taken out of his effects, but after the verdict no further proceedings were taken against the defendant, the rule of this court being, that after a prisoner has given notice of his intention to apply for a discharge under the insolvent debtors' act, he shall not be superseded by reason of a plaintiff's forbearing to proceed against him, until some rule or order shall be made in the cause by this court, or one of the judges thereof.

Vaughan Serjt. had obtained a rule *nisi* to discharge the insolvent out of custody, at the suit of the present Plaintiff, on the ground that the suit had abated by the death of the intestate, and that the rule of Court, and the order of the Insolvent Debtors' Court, could only apply where a suit was still pending.

Cross Serjt., for the administrator, relied on the rule of Court, and contended, that the administrator was a creditor, entitled to detain the Defendant, under the order of the Insolvent Debtors' Court.

 Lord

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Lord GIFFORD C. J., after stating the facts, said,

The Defendant, by giving notice of his intention to come up under the insolvent debtors' act, rendered it unnecessary for the Plaintiff to take further proceedings, that being the very object of the rule of *Easter*, 3 *G.* 4. After this the Plaintiff died, but administration was regularly taken out, and the administrator became one of the Defendant's creditors. It has been urged that this suit abated by the death of the Plaintiff, and perhaps, strictly speaking, this was so; but the rule of *Easter*, 3 *G.* 4. having rendered it unnecessary for the Plaintiff to proceed, and it not being necessary to detention under the insolvent debtors' act, that a party should be in custody under execution, we think the rule which has been obtained in this case must be discharged.

The rest of the Court concurred.

Rule discharged accordingly.

SALTOUN and Others, Executrix and Executors of SIMON FRASER the Elder, deceased, *v.* HOUSTOUN and Others, Executrix and Executors of JAMES HENRY HOUSTOUN, deceased, who survived SIMON FRASER the Younger.

Feb. 5.

By indenture between *S. F.*, senior, of the first part, *S. F.*, junior, of the second part, and *J. H. H.* on the third part, it was agreed that *S. F.*, senior, should retire from business, and *S. F.*, junior, and *J. H. H.* become partners; that the capital employed should be 36,000*l.*, 24,000*l.* of which *S. F.*, senior, should advance for *S. F.*, junior, and 12,000*l.* was to be advanced by *J. H. H.* The deed then proceeded, "And whereas an account of all the debts of *S. F.*, senior, in his business of merchant, has been this day taken, and the balance in his favour amounts to 38,033*l.*, *and whereas it has been agreed by and between* S. F., *senior*, S. F., *junior, and* J. H. H., *that the whole of the debts and credits of* S. F., *senior, shall be received and paid by* S. F. *junior, and* J. H. H., and that the balance of 38,033*l.* shall be accounted for and paid by them in manner hereinafter mentioned; and *S. F.*, senior, by indenture, hath assigned the debts and credits to them, this indenture further witnesseth that it is agreed, that in consideration of 12,000*l.* paid to *S. F.*, senior, by *J. H. H.*, and for raising 24,000*l.*, as *S. F.*, junior's share of the capital, the sum of 36,000*l.*, part of the 38,033*l.*, is to be retained by *S. F.*, junior, and *J. H. H.*, and the remaining 2033*l.* paid to *S. F.*, senior, by instalments, at six, twelve, and eighteen months; and if any of the debts shall prove bad, the loss shall be borne by *S. F.*, junior, and *J. H. H.*:" Held, that this deed amounted to a covenant by *S F.*, junior, and *J. H. H.* to pay the debts due from *S. F.*, senior, in his business, at the date of the indenture.

THE Plaintiffs declared in covenant upon an indenture, which being set out on oyer, appeared to have been entered into on the 29th of *April*, 1808, between *Simon Fraser* of the first part, the Honourable *Simon Fraser*, grandson of the first-named *Simon Fraser*, of the second part, and *James Henry Houstoun* of the third part; and, after reciting that *S. F.* the grandfather, had for several years carried on the business of a general merchant, and that it had been then lately agreed between *S. F.* the grandfather, *S. F.* the grandson, and *J. H. H.*, that *S. F.* the grandfather should retire from the business, and that *S. F.* the grandson and *J. H. H.* should become copartners therein upon the terms thereinafter

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mentioned, witnessed, that for effectuating the said agreement, and in consideration of the mutual trust and confidence which *S. F.* the grandson and *J. H. H.* had and reposed in each other, each of them, the said *S. F.* the grandson, and *J. H. H.*, for himself, his heirs, executors, and administrators, did covenant with the other of them, his executors and administrators, mutually by that indenture in manner following: (that is to say) that they *S. F.* the grandson and *J. H. H.* would become and remain copartners as general merchants for the term of ten years, to be computed from the day of the date of that indenture, that the capital of the copartnership should consist of 36,000*l.*, 24,000*l.* of which should be advanced in manner thereinafter mentioned, by *S. F.* the grandfather, as the proportion of *S. F.* the grandson, and 12,000*l.* should be advanced by *J. H. H.* in manner thereinafter mentioned, as his proportion, and that the whole of the capital of the copartnership should remain in the business, and that neither of the copartners should, during the copartnership, be at liberty to draw out any part thereof: the indenture then proceeded, "And whereas an account of all the debts and credits of *S. F.* the grandfather, in his business of general merchant, hath been this day taken, and the balance in his favour amounts to 38,033*l.* 3*s.* 5*d.*; *and whereas it hath been agreed, by and between* S. F. *the grandfather*, S. F. *the grandson*, *and* J. H. H., *that the whole of the said debts and credits of* S. F. *the grandfather shall be received and paid by* S. F. *the grandson, and* J. H. H.; that the balance of 38,033*l.* 3*s.* 5*d.* shall be accounted for and paid by them in manner hereinafter mentioned; and that for the better enabling them to call in, collect, and receive such credits, *S. F.* the grandfather, by an indenture of assignment, bearing even date with that indenture, hath assigned the same unto *S. F.* the grandson and *J. H. H.*;" and then further witnessed, that it was thereby agreed, by and between

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between *S. F.* the grandfather, *S. F.* the grandson, and *J. H. H.*, that, in consideration of 12,000*l.* unto him, *S. F.* the grandfather, in hand paid by *J. H. H.*, as his share of the capital, and for raising 24,000*l.*, the proportion of *S. F.* the grandson, of such capital, the sum of 36,000*l.*, part of the sum of 38,033*l.* 3*s.* 5*d.*, the balance of the debts and credits of *S. F.* the grandfather, should be retained and kept by them, *S. F.* the grandson and *J. H. H.*, as their capital or joint stock, and should belong to them in the following proportions, (that is to say) 24,000*l.*, part thereof, to *S. F.* the grandson, and 12,000*l.*, the residue thereof, to *J. H. H.*; and it was also further agreed between *S. F.* the grandfather, *S. F.* the grandson, and *J. H. H.*, that 2,033*l.* 3*s.* 5*d.* being the remainder of the balance of the debts and credits of *S. F.* the grandfather, should be paid by *S. F.* the grandson and *J. H. H.*, unto *S. F.* the grandfather, his executors, administrators, or assigns, by equal instalments, at the end of six, twelve, eighteen, and twenty-four months from the date of that indenture, but without interest; and it was thereby further agreed and declared between the parties thereto, that in case any of the debts so assigned to *S. F.* the grandson, and *J. H. H.*, by *S. F.* the grandfather, should thereafter prove bad and not recoverable, the loss should be borne by *S. F.* the grandson and *J. H. H.*; and it was thereby agreed between the copartners, that the joint trade or business should be carried on under the name and firm of "The Honourable *Simon Fraser* and Company," and that each of them and their respective executors and administrators, should during the copartnership, and at the determination thereof, have and enjoy a several share and right, title, and interest of, in, and to the said joint stock, and all profits arising therefrom, in the proportion following; *S. F.* the grandson in and to two-third parts thereof, and *J. H. H.* in and to one-third part thereof,

 and

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and should and might accordingly, upon or at the end of the copartnership, receive and take his and their respective parts, shares, and proportions of the joint stock and profits to his and their own use, without any benefit of survivorship: then followed the detailed stipulations usual in copartnership deeds, as to the mode in which the partnership concerns should be conducted.

The second count of the declaration, in addition to the indenture just described, set out another of the same date, by which *Simon Fraser* the grandfather assigned and transferred to *Simon Fraser* the grandson, and *James Henry Houstoun*, all and every the debts due to *Simon Fraser* the grandfather, referred to in the abovementioned deed, and specified in a schedule appended to the deed of assignment, and then averred that there were no deeds, instruments, or writings between the parties, in regard to the matters in the two indentures mentioned, save the two indentures, and that they contained the whole of the agreement between the parties, relative to the debts and credits of *Simon Fraser* the grandfather. Both counts of the declaration, after alleging a covenant by *James Henry Houstoun* and *Simon Fraser* the grandson, to pay the debts of *Simon Fraser* the grandfather, and averring the death of *James Henry Houstoun*, and of *Simon Fraser* the grandson, assigned for a breach, that *Simon Fraser* the grandson and *James Henry Houstoun*, in their respective lifetimes, and *James Henry Houstoun* in his lifetime, after the death of *Simon Fraser* the grandson, whom he survived, and the Defendants' executrix and executors as aforesaid, had not, nor had any or either of them, paid the debts of *Simon Fraser* the grandfather, owing by him in his business of a general merchant, on the 29th of *April*, 1808; and that in default thereof, the Plaintiffs, as executrix and executors as aforesaid, had paid in respect of those debts 10,031*l.* 15*s.* 3*d.* Demurrer and joinder.

Taddy

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Taddy Serjt., in support of the demurrer. It may be admitted that where the intention of parties is clear, a covenant may be collected from any part of a deed, and may be couched in any form of expression. Here, neither in the situation of the parties, nor in the language of the deed, can any intention or covenant be collected that the defendants or the intestate were to pay the debts of *Simon Fraser*, the grandfather: not in the situation of the parties, for it would be absurd to suppose that *Houstoun*, who was interested only to the amount of a third in the partnership concern, should take upon himself a liability to the extent of all the debts contracted previously to his becoming a partner; — not in the language of the deed, because there is no express covenant for any such liability, no time specified within which the debts are to be paid, nor any expression from which it can be inferred that *Houstoun* has rendered himself responsible to such an extent. The language of the recital refers to a past time, and to another and separate parol agreement. It is quite consistent with the language of the deed and the declaration, that the grandfather's debts might have been paid under the provisions of this parol agreement; and as the rest of the deed contains *verba de præsenti*, for instance, as to the covenant to pay the grandfather 2033*l.*, the recital neither can be nor was intended to be available for the purposes of the present action. A mere recital of a debt under seal will not make it a specialty, *Lacon* v. *Mertins* (a), and although it should be collected from the recitals that the Defendant was to pay, yet it is no where provided by this deed that he shall do so: there might have been a prior separate agreement for the payment of those debts, although the declaration avers that there was none at the time of the execution of the indentures be-

(a) 1 *Ves.* 312.

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sides what was contained in the indentures, and in such a case the recital will not constitute a covenant. *Geary* v. *Read* (a), *Montague* v. *Bath* (b).

D'Oyly Serjt., for the Plaintiff. Where it can be understood from the deed to have been the intention of the party to bind himself by any agreement, a covenant may be collected from the whole of the deed taken together, or from any form of expression in any part of it. The cases to this effect are almost innumerable, but the following may be particularly noticed: *Deering* v. *Farrington* (c), *Russell* v. *Gulwell* (d), *Pordage* v. *Cole* (e), *Brice* v. *Carre*, (f) *Seddon* v. *Senate* (g), *Duke of St. Albans* v. *Ellis* (h). Year Book, 14 *H.* 8. 15. Further than this, the courts have gone great lengths in extracting and eliciting covenants from the various parts of a deed, where, perhaps, the parties were not aware that they were subjecting themselves to an action of covenant; as in the obvious instances of the construction put on the words *dedi, demisi, concessi*; and this applies to the argument, that the part of the deed from which it is sought to charge the present Defendant is in the past tense. That it was the intention of the parties that the Defendant should be so liable there can scarcely be any doubt, for why should *Simon Fraser*, the grandfather, assign all his credits to the Defendant and his partner, if these latter were not to give something in the shape of an equivalent, by discharging the debts. As to the proportions in which they should respectively do this, and the amounts of their several interests, that was a matter of arrangement between themselves, with which

(a) 1 *Roll. Abr. Covenant*, C. *Cro. Car.* 128.
(b) 3 *Cha. Cas.* 101.
(c) 1 *Mod.* 113.
(d) *Cro. Eliz.* 657.
(e) 1 *Saund.* 319.
(f) 1 *Levinz*, 47.
(g) 13 *East*, 63.
(h) 16 *East*, 352.

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the grandfather had nothing to do. With respect to the covenant being extracted from the recital, there are many cases in which it has been expressly determined that the the language of a recital may constitute a covenant, *Severn* v. *Clark* (*a*), *Graves* v. *White* (*b*), *Hollis* v. *Carr* (*c*), *Barfoot* v. *Freswell* (*d*). The rules of pleading are more strict than the construction of deeds, because in pleading the parties are adverse, and yet many of the most material averments in pleading come under a "whereas;" as in trespass, case for an escape, &c. The present is one entire transaction, the whole of which may be collected from the deed, and where that is the case it is not allowable to go into extrinsic evidence to shew another agreement on the same subject, *Meres* v. *Ansell* (*e*), *Mayer* v. *Everth* (*f*), *Old* v. *Kay*. (*g*) In *Geary* v. *Read* the words which it was sought to construe as a covenant were merely a condition and limitation of a lease. *Lacon* v. *Mertins* only decided that the recital of a debt in an indenture does not make it a specialty; and *Montague* v. *Bath* turned on the effect of a recital which misrecited a deed and a will.

Taddy having replied,

LORD GIFFORD C. J. delivered judgment. This is an action of covenant by the executrix and executors of *Simon Fraser*, against the representatives of *James Henry Houstoun*. The declaration, after setting out a deed between *Simon Fraser*, described as the grandfather on the first part, *Simon Fraser* the grandson on the second part, and *James Henry Houstoun* on the third part, alleges a covenant, by which *Simon Fraser* the grandson, and *James Henry*

(*a*) 2 *Leon.* 122.
(*b*) 1 *Eq. Cas. Ab. Portions.*
(*c*) 2 *Mod.* 87.
(*d*) 3 *Keb.* 465.
(*e*) 3 *Wils.* 275.
(*f*) 4 *Camb. N. P. C.* 22.
(*g*) *K. B. Hil. T.* 1824., not yet reported.

Houstoun,

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Houstoun, did thereby for themselves, their executors, and administrators, covenant, promise, and agree to, and with the said *Simon Fraser* the grandfather, amongst other things, in manner following, that is to say, that the whole of the debts and credits of the said *Simon Fraser* the grandfather should be received and paid by them, the said *Simon Fraser* the grandson and *James Henry Houstoun*; it then states the death of *James Henry Houstoun* and the breach of this covenant. The second count differs from the first only in setting out the deed, by which *Simon Fraser* the grandfather assigned his credits to *Simon Fraser* the grandson and *James Henry Houstoun*. To this declaration, the defendants, after having the deed set out on oyer, demur, and the question is, whether upon the whole of the deed the Court can collect, on the part of *Simon Fraser* the grandson and *James Henry Houstoun*, the covenant with which they are charged. It is admitted, that, in order to constitute a covenant, it is not necessary the word "covenant" should be expressly employed, and if it were necessary to refer to cases in support of so clear a position, I might mention *Stevinson's* case. (a) There, in debt upon bond, the condition was, that whereas the Plaintiff had covenanted with the Defendant, that it should be lawful for the Defendant to cut down wood for fire-boot and hedge-boot, without making any waste or cutting more than necessary; and the Plaintiff assigned the breach in that covenant, that the Defendant had committed waste in felling wood, &c. and the condition was to perform all covenants and agreements; and exception was taken, because that the condition ought to extend but unto covenants to be performed on the part of the lessee; yet the exception was not al-

(a) 1 *Leon.* 324.

lowed,

lowed, "for it is the agreement of the lessee, although it be the covenant of the lessor."

The same principle was laid down in *Hollis* v. *Carr*, where *Finch* Lord Chancellor says, "there are many cases where words will make a covenant because of the agreement, when the general words of "covenant, grant," &c. are wanting: as, "yielding and paying" will make a covenant. And he held, that articles of agreement reciting an intended marriage, covenanting to settle a jointure in consideration of a marriage portion, and concluding thus, "and it is hereby agreed that a fine shall be levied to secure the payment of the said portion," amounted to a covenant to levy the fine. In order, therefore, to decide the present case, we must look with great accuracy to the instrument before the Court, to see what are the expressions which have been employed by the parties, and what those expressions will include. It appears that the business of a merchant had been carried on to a great extent by *Simon Fraser* the grandfather. It was agreed that he should retire; that *Simon Fraser* the grandson and *James Henry Houstoun* should carry on the business as partners; and that a capital should be advanced for this business in the manner mentioned in the deed; and then comes that part of the instrument on which the present question turns, "And whereas an account of all the debts and credits of *S. F.* the grandfather, in his business of general merchant, hath been this day taken, and the balance in his favour amounts to 38,033*l.* 3*s.* 5*d.*; and whereas it hath been agreed by and between *S. F.* the grandfather, *S. F.* the grandson, and *J. H. H.*, that the whole of the said debts and credits of *S. F.* the grandfather shall be received and paid by *S. F.* the grandson and *J. H. H.*, and that the balance 38,033*l.* 3*s.* 5*d.* shall be accounted for and paid by them in manner hereinafter mentioned; and that for the better enabling them

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them to call in, collect, and receive such credits, *S. F.* the grandfather, by an indenture of assignment bearing even date with these presents," (this indenture is set out in the second count, and appears to be a deed of transfer to *Simon Fraser* the grandson and *James Henry Houstoun*, of debts due to *Simon Fraser* the grandfather,) "hath assigned the same unto *S. F.* the grandson, and *J. H. H.* Now this indenture further witnesseth, that it is hereby agreed by and between *S. F.* the grandfather, *S. F.* the grandson, and *J. H. H.*, that in consideration of 12,000*l* unto him, *S. F.* the grandfather, in hand paid by *J. H. H.* as his share of the capital, and for raising 24,000*l.* the proportion of *S. F.* the grandson, of such capital, the sum of 36,000*l.*, part of the sum of 38,033*l.* 3*s.* 5*d.*, the balance of the debts and credits of *S. F.* the grandfather, shall be retained and kept by them, *S. F.* the grandson and *J. H. H.*, as their capital or joint stock, and shall belong to them in the following proportions, (that is to say,) 24,000*l.* part thereof to *S. F.* the grandson, and 12,000*l.* the residue thereof to *J. H. H.*; and it is also further agreed between *S. F.* the grandfather, *S. F.* the grandson, and *J. H. H.*, that 2033*l.* 3*s.* 5*d.* being the remainder of the balance of the debts and credits of *S. F.* the grandfather, shall be paid by *S. F.* the grandson and *J. H. H.*, unto *S. F.* the grandfather, his executors, administrators, or assigns, by equal instalments at the end of six, twelve, eighteen, and twenty-four months from the date of these presents, but without interest; and it is hereby further agreed and declared between the parties hereto, that in case any of the debts so assigned to *S. F.* the grandson and *J. H. H.*, by *S. F.* the grandfather, shall hereafter prove bad and not recoverable, the loss shall be borne by *S. F.* the grandson and *J. H. H.*" The deed contains many provisions which do not bear on the present question, but relate to the mode in which the business was to be

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carried on. Now, what was the object which the parties had in view by this instrument? The elder *Fraser*, who was about to retire from business, engages to relinquish it to the younger *Fraser* and *Houstoun*, and he relinquishes it without a stipulation for any compensation: a balance is struck, and it is found that there is due to him a sum of more than 38,000*l.* He says in effect, I will assign all this, you shall take both credits and debts, and account to me for the whole in a manner pointed out by the deed; *Houstoun* shall advance 12,000*l.* towards the capital to be employed in carrying on the business, and 24,000*l.* out of the balance due to me shall remain in it on the part of *Simon Fraser* the younger. Then, as many of the credits might turn out unproductive, there is an express provision, that the loss, if any, should fall on the two partners, that is, that it should come into the general account of the trade, and that the balance of 2033*l.* should be accounted for to the grandfather. There is nothing unreasonable, that after the grandfather had assigned all the credits, the partners should take upon themselves the discharge of all the debts; but whether unreasonable or not, they take this upon themselves by express provision, and not under a mere recital, as it has been contended on the part of the Defendant. The deed states, "it has been agreed that the whole of the debts and credits of *Simon Fraser* the grandfather, shall be received and paid by *Simon Fraser* the grandson and *James Henry Houstoun*;" and there is an express covenant, that they shall pay to the grandfather the balance of 2033*l.* For the Defendant, it is contended that this passage is a mere recital of a separate parol agreement, according to the terms of of which it had been agreed the debts should be paid; and that, although this supposed recital might perhaps furnish evidence in support of another action, it does not amount to any stipulation by which *Houstoun* rendered

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rendered himself liable to the debts under the instrument now put in suit. The Court, however, must look at the whole of this instrument, and if they find it contains a clear agreement to do any act, whether in the way of covenant, provision, or even exception, then it is clear that an action of covenant may be maintained on the instrument. So looking at this instrument, and considering the nature of the subject-matter, we think there is that which amounts to the covenant which has been correctly stated in the declaration, and that the Plaintiffs are entitled to recover.

PARK J. No one can read the words "And whereas an account of all the debts and credits of the said *S. F.* the grandfather, in his said trade or business of a general merchant, hath been this day taken, and the balance in favour of the said *S. F.* the grandfather amounts to the sum of 38,033*l.* 3*s.* 5*d.* And whereas it has been agreed by and between the said *S. F.* the grandfather, and *S. F.* the grandson, and *J. H. H.*, that the whole of the said debts and credits of the said *S. F.* the grandfather shall be received and paid by the said *S. F.* the grandson and *J. H. H.*, and that the said balance of 38,033*l.* 3*s.* 5*d.* shall be accounted for and paid by them in manner hereinafter mentioned;" and have any doubt that it was the intention of the parties that *Simon Fraser* the grandson and *James Henry Houstoun* should pay the debts of *Simon Fraser* the grandfather. If we were to hold otherwise, they would receive all the credits, and yet be under no obligation to furnish any consideration for such a benefit. As to the argument, that it would be a hardship that a partner who is benefitted only to the extent of a third, should pay all the debts, that is a hardship which applies to all cases of partnership, and is a matter which the partners must

arrange

arrange among themselves, but which cannot affect the claim on the part of the grandfather.

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BURROUGH J. The agreement which appears in the language of the deed, must have been entered into after the account of the grandfather's concerns had been taken; why are we to presume a separate and independent parol agreement unconnected with this? The whole was one transaction, and it must be intended that the agreement specified in the deed with respect to the payment of the debts was part of that transaction, and equally binding on the parties as all the rest of it.

Judgment for the Plaintiff.

ROBERTSON v. CLARKE.

Feb.

Where a ship was so shattered in a storm that upon survey it was found the expence of repairing her would far exceed her original value, and the captain having sold her *bonâ fide* for the benefit of all concerned, the purchaser shortly afterwards broke her up: Held, that this was such an urgent necessity as justified the sale.

The *Mauritius* is not in the *East Indies*, nor an *Indian* island.

THIS was an action on two policies of insurance. The first was dated 25th of *January*, 1820, and was effected on the ship *Neptune*, valued at 8000*l*., for a voyage "at and from *London* to *New South Wales* and *Van Diemen's Land*, the *East Indies*, *East India* islands, *Persia*, and elsewhere, with liberty to touch and call at all ports and places on this or the other side of the *Cape of Good Hope*, until her arrival at her final port of discharge in *Europe*." The second policy was on the freight of the ship *Neptune*; it was dated on the 16th of *January*, 1821, and was effected for the sum of 4000*l*., the risk commencing "at and from the termination of her outward voyage at *New South Wales* and *Van Die-*

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men's Land, to her ports of discharge and loading in *India*, the *East Indian* islands, and during her stay and loading there, to her final port of discharge in *Europe*." The cause was tried before *Burrough* J. at *Guildhall*, when the Plaintiff called several witnesses, from whose testimony it appeared that the *Neptune* sailed from *England* in the beginning of 1820, with convicts for *New South Wales*, having previously undergone a survey by the government officers appointed for that purpose. She performed her outward voyage well, and having discharged her convicts, she sailed to *Surabaya*, where she took in a cargo of rice, which she carried to the island of *Mauritius*, where she discharged the cargo, and was unloaded to her very keel. The rice was found to be perfectly free from damage, and on a survey being had, the ship's bottom was found to be quite dry, and in every respect the vessel appeared sound and seaworthy. Having taken in a cargo at the island of *Mauritius*, she set sail for *Europe*; at the time of her making land at *Algoa Bay*, the weather became very bad, and after that period she encountered a gale, which continued incessantly until she arrived at *Symond's Bay*. When she neared that port she was in such a state that the captain was obliged to fire guns of distress, in consequence of which the inhabitants sent out assistance, and the ship was brought into port. She was immediately surveyed, but the extent of her damage could not be ascertained, as she had a full cargo on board. She was therefore unloaded, and surveyed a second time, when the surveyors, among whom was an agent of *Lloyds*, upon the captain's applying for advice, recommended that she should be sold, as the expence of repairing her would much exceeed her original value. The captain, acting under this advice, and being ignorant of the insurance effected on her, sold the ship and some part of the cargo which had been damaged, for about 1100*l.*,

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and having transhipped the remainder, he returned to *Europe*. No estimate of the expence of repairing was given in evidence; but it was proved that the persons who had bought the vessel on speculation had, after a month, brought her round to *Table Bay*, where she could have been completely repaired, but finding that course to be unadvisable on account of the damage she had sustained, they broke her up. The Defendant contended at the trial that the captain ought to have repaired at any expence less than the value insured, and that he was entitled to a verdict on the second policy, as the island of the *Mauritius* was not an *Indian* island within the terms of the insurance. To support the latter part of the defence, he called a witness from the *East India-house*, who said he apprehended that in physical geography, the *Mauritius* must be considered as an *African* island belonging to the *Madagascar Archipelago*. The Plaintiff's witnesses had previously, on cross-examination, stated that it was generally considered as an *Indian* island. The learned Judge left it to the jury to say, whether they thought the captain justified in selling the vessel under the circumstances which had been proved, and told them, that if they thought the sale a matter of necessity they must find for the Plaintiff. He also left them to consider of the evidence which had been offered relative to the *Mauritius* being, or not, an *Indian* island.

The jury returned a general verdict for the Plaintiff.

Vaughan Serjt., on a former day, had obtained a rule to shew cause why that verdict should not be set aside and a new trial granted, on the two objections taken at the trial.

Pell Serjt. now shewed cause against the rule. There is one distinction between the circumstances of this case

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and those on which the Defendant will rely: in all the other cases, the vessel, after having been sold, has been repaired by the purchasers, and has afterwards brought a full cargo home, while in this case, the purchasers, after having taken the trouble of getting the ship round to *Table Bay*, found the attempt to repair her impracticable, and broke her up. The captain, too, effected the sale in ignorance of the vessel being insured, and he therefore acted as he conceived for the benefit of his owners, whom he believed to be the only persons interested. Upon these facts, it is clear that the sale was *bonâ fide*, and was the result of extreme necessity. As to the objection respecting the situation of the island of *Mauritius*, the only witness called for the Defendant apprehended the island must be considered in physical geography to belong to *Africa*, and to form part of the *Madagascar Archipelago*. To oppose this, there was the evidence of the Plaintiff's witnesses, who stated that it was always considered as an *Indian* island, and that general reputation is supported by the testimony of several authors. In *Mallam's Naval Gazetteer* it is described thus, "*Mauritius*, an island in the *East Indian Ocean.*" In *Crutwell's Gazetteer*, "*France, Isle of*, an island in the *Indian Ocean.*" In *Walker's Gazetteer* it is described in the same manner; and in *Brooks's Gazetteer* it is described as, "*Mauritius*, an island in the *Indian Ocean*, 400 miles east of *Madagascar.*" All these authors support the testimony given at the trial that it is an *Indian* island.

Vaughan and *Taddy* Serjts., in support of the rule. As to the sale, the only justification for such a proceeding, is the extreme and absolute necessity of the case. Now that necessity did not exist in the present instance, for the ship could have been repaired at the *Cape*. It was stated that the expence of repair would have exceeded her value; but if the Plaintiff chose to value his

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vessel in the policy at 8000*l.*, he was bound by that valuation, and should have repaired her at any cost less than that sum. He might then have claimed his loss from the underwriters, as the policy was a contract of indemnity; instead of which he put an end to the risk, claimed for a total loss, and materially altered the nature of the contract. From the language of *Dallas* C. J. in *Read* v. *Bonham* (*a*), from the case of *Idle* v. *The Royal Exchange Assurance* (*b*), and many other cases, it is clear that nothing but extreme necessity can justify the sale of the ship. It is not enough that the sale is made honestly and with a good intention. As to the authorities cited to prove the *Mauritius* to be an *Indian* island, they are opposed by the *Encyclopædia*, in which it is called an *African* island; and in *Paul et Virginie* it is described in the same manner. But without referring to authorities, common sense decides the question. It is only 400 miles from *Madagascar*, while it is four times that distance from the *East Indies*, and though now in possession of *England*, it does not form part of the *East Indian* dependencies, but has a Chief Justice appointed by the crown of *England*.

Cur. adv. vult.

Lord GIFFORD C. J. now delivered the judgment of the Court, and having stated the facts of the case, said,

The rule *nisi*, which has been obtained for setting aside the verdict in this case, was granted on two grounds. First, that the vessel ought not to have been sold, but ought to have been repaired. Secondly, with respect to the insurance on freight, that no risk attached, because the cargo was not shipped in the *East Indies* or *Indian* islands, but at the *Mauritius*.

As to the objection that the ship ought to have been repaired, and not sold, it is unnecessary for me to in-

(*a*) 3 *B. & B.* 147. (*b*) 3 *B. Moore*, 115.

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vestigate the numerous cases on the subject. *Reid* v. *Darby* (a), the case of the *Gratitudine* (b), *Idle* v. *The Royal Exch. Assur. Comp.* (c), *Reid* v. *Bonham* (d), and others. This principle may be clearly laid down, that a sale can only be permitted in case of urgent necessity, that it must be *bonâ fide* for the benefit of all concerned, and must be strictly watched. Nothing now can impeach the correctness of this principle, and the only question here is, did the evidence establish that urgent necessity? The jury have come to the conclusion that it did; and after hearing the notes of the learned Judge who presided, I am of the same opinion. The vessel was seaworthy when she left the *Mauritius*; after that, and before she reached the *Cape*, she encountered a severe storm, and with the utmost difficulty succeeded in making *Symond's Bay*; there she underwent a first survey, with her cargo on board, and as the survey under those circumstances was necessarily incomplete, she received a second, when it was ascertained she could not be repaired at *Symond's Bay*. The captain applied to *Lloyds'* agent, and by his advice, and for the benefit of all concerned, sold the vessel. The purchaser, after a month had elapsed, succeeded in bringing her round to *Table Bay*, but to shew the state she was in, he did not attempt to repair, but broke her up at once. On these facts, I think a case of urgent necessity has been made out. It is not disputed that the sale was *bonâ fide*, and it is clear that it was for the benefit of all concerned. I agree that it is not sufficient to shew that the sale was *bonâ fide* and for the benefit of all concerned, unless it be also shewn that there was urgent necessity for its being resorted to, but that having been satisfactorily proved in the present instance, the verdict cannot be disturbed on that ground.

(a) 10 *East*, 143.
(b) 3 *Rob. Adm. Rep.* 240.
(c) 3 *B. Moore*, 115.
(d) 3 *B. & B.* 147.

With

With respect to the policy on freight, it was incumbent for the Plaintiff to prove that the *Mauritius* was an island falling within the terms of the policy. Now there can be little doubt that, geographically considered, the *Mauritius* is not in *India* or among the *Indian* islands; and the testimony to this point on the part of the Plaintiff rested on a single witness, who said he considered the island to be in *India*. This was met by testimony on the part of the Defendant, that it was an island belonging to the *Madagascar Archipelago*, and in physical geography, part of the district of *Africa*. No evidence was adduced to shew that it was esteemed *Indian* in mercantile acceptation, and on this part of the case the Court thinks the Plaintiff has failed. The verdict must be confined therefore to the policy on the ship.

Verdict reduced accordingly.

N. B. — In a subsequent action against another underwriter on the second policy, tried at the *London* sittings after this term, evidence being adduced to shew that in mercantile acceptation, the *Mauritius* is esteemed an *Indian* island, the jury found a verdict for the Plaintiff.

HILDYARD v. SMITH.

Feb. 9.

In an action on a bill of exchange, the Court would not compel the Plaintiff to deposit the bill in the hands of the prothonotary for the purpose of enabling the Defendant to inspect it.

ONSLOW Serjt. had obtained a rule calling on the Plaintiff to shew cause "why a bill of exchange, on which this action was brought, should not be impounded in the hands of the prothonotary, and the Defendant be permitted to inspect it," in order to see whether or no it was a forgery. He had suggested that bonds were commonly submitted in this manner to the

 inspection

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inspection of the Defendant; and mentioned an unpublished case in the Exchequer, in which the same thing had been done in the instance of a bill of exchange. But cause being shewn by

Pell Serjt., who observed that the reason alleged for the necessity of inspection would be matter of defence at the trial, the Court

Discharged the rule.

Feb. 9.

GEORGE SIMSON v. JOHN COOKE and Others, Executors of WILLIAM PEARETH.

A bond by which, after reciting the partnership of *J. C.* and *T. C.*, *W. P.* became surety for such sums as should be advanced to meet bills drawn by *J. C.* and *T. C.*, or either of them, was held not to extend to bills drawn by *J. C.* after the death of *T. C.*

THE Plaintiff declared in debt on a bond which, being set out on oyer, was as follows:

We, *John Cooke* and *Thomas Cooke*, both of *Sunderland*, bankers, carrying on business under the firm of *Cooke* and Co., and *William Peareth*, are jointly and severally bound to *Patrick Craufurd Bruce*, *George Simson*, and *George Taylor*, of *London*, bankers, carrying on business under the firm of "*Were, Bruce, Simson*, and *Taylor*," in the penal sum of 5000*l*., to be paid to the said *P. C. B.*, *G. S.*, and *G. T.*, their attorney, executors, administrators, or assigns, for which payment we bind ourselves and each of us by himself for the whole, our and each of our heirs, executors, and administrators, by these presents sealed with our seals; dated 12th of *August*, 1805.

The condition of the bond was, "Whereas *John Cooke* and *Thomas Cooke* have applied to *P. C. Bruce*, *G. Simson*, and *G. Taylor*, to permit them the said *J. C.* or *T. C.*, or persons authorized by them, to draw bills on

P. C. B.,

P. C. B., *G. S.*, and *G. T.* for their acceptance and payment, they, the said *J. C.* and *T. C.* engaging to pay or remit to the said *P. C. B.*, *G. S.*, and *G. T.* the amount of such bills, at or before the time such bills shall become respectively due; and in order the better to secure *P. C. B.*, *G. S.*, and *G. T.*, or any of them, associated or not with any other person or persons in the same or any other firm of business, the due and punctual remittance of money to pay the bills so to be accepted by them; and also the payment of all such sum and sums of money as they the said *P. C. B.*, *G. S.*, and *G. T.* shall advance for the said *J. C.* and *T. C.*, or which shall or may be due, or owing, or payable to them the said *P. C. B.*, *G. S.*, and *G. T.* from the said *J. C.* and *T. C.* or any or either of them at any time hereafter, on any account whatsoever; they the said *J. C.* and *T. C.* have agreed to execute a bond to *P. C. B.*, *G. S.*, and *G. T.*, together with *William Peareth*, as their surety, and in consideration thereof *P. C. B.*, *G. S.*, and *G. T.* have agreed to comply with such request for so long a time as they may think proper: now the above written obligation is such that if *J. C.* and *T. C.*, their executors and administrators, shall remit to *P. C. B.*, *G. S.*, and *G. T.*, and every of them, associated or not, as aforesaid, the amount of all such sums of money as they *J. C.* and *T. C.*, or either of them, or any other person authorized by them or either of them, shall or may draw on *P. C. B.*, *G. S.*, and *G. T.*, or any of them, associated or otherwise as aforesaid, respectively, or made payable at their house as and when the same bills and notes shall respectively become due, and also shall from time to time pay or cause to be paid unto *P. C. B.*, *G. S.*, and *G. T.*, and every of them, associated or not, as aforesaid, their and each of their heirs, executors, and administrators, all such sums of money as shall be paid by them or any of them, associated or not as aforesaid, respectively,

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respectively, for or on account of any note or notes, bill or bills of exchange, which shall at any time hereafter be drawn by *J. C.* and *T. C.* or any or either of them, or any other person or persons authorized by them and accepted by *P. C. B.*, *G. S.*, and *G. T.*, or any of them, associated or not as aforesaid, or made payable at their house, and also all such sums of money as *P. C. B.*, *G. S.*, and *G. T.*, or any or either of them, associated or not, as aforesaid, shall, at any time hereafter, pay, expend, lend, or advance to or for *J. C.* and *T. C.* or any or either of them, or which shall at any time hereafter be due to them, *P. C. B.*, *G. S.*, and *G. T.*, from *J. C.*, and *T. C.*, on any account whatsoever, together with interest for the same, from the time the same shall be advanced and paid by, or due and owing to them, the said *P. C. B.*, *G. S.*, and *G. T.*, or any or either of them, associated or not as aforesaid, after the rate of five *per cent. per annum*, and the usual and accustomed commission, costs, charges, damages, and expences, which shall at any time hereafter be incurred, suffered, borne, paid, or sustained by *P. C. B.*, *G. S.*, and *G. T.*, or any of them, associated or not as aforesaid, and also all such sums as they shall or may be bound, or liable, or security to pay for or on account of *J. C.* and *T. C.*, or any or either of them, then and in such case the obligation to be void, otherwise to remain in full force and effect.

Various breaches were assigned under the statute, for non payment of sums advanced by *Were* and Co. to *John* and *Thomas Cooke* during their joint lives, and to *John Cooke*, after the death of *Thomas Cooke*.

The defendants pleaded the general issue. At the trial of the cause before *Burrough* J., at the *London* sittings after *Trinity* term last, after proof of the bond, which was stamped with a 7*l.* stamp, it appeared that the usual course of business between *Cooke* and Co. and

Were

Were and Co. was by *Cooke* and Co. drawing bills upon *Were* and Co., and making drafts and notes payable at their banking house, to answer which *Cooke* and Co. from time to time remitted bills and cash to *Were* and Co.

Thomas Cooke died in *May* 1814, at which time the balance due from *Cooke* and Co. to *Were* and Co. was 119,534*l.* After his death the business went on in the same way as before; bills were drawn on *Were* and Co., notes made payable at their house, and remittances were continued from time to time to the general account as it then stood, no balance being struck and no rest made. The amount of the remittances, subsequent to the death of *Thomas Cooke*, exceeded 119,534*l.* but on the closing of the concern in 1816 there was a balance of 65,000*l.* due from *Cooke* and Co. to *Were* and Co. Upon these facts, a verdict was taken for the Plaintiff in the sum of 5000*l.*, subject to the opinion of the court on these objections started at the trial, and afterwards insisted on by

Bosanquet Serjt. who, in *Michaelmas* term last, obtained a rule for setting aside this verdict, and entering a nonsuit instead, or for setting aside the verdict as to 5000*l.* debt, and entering instead thereof a verdict for one shilling damages, on the ground, First, that the bond, being intended to secure a balance of uncertain amount, ought to have had a 20*l.* stamp; secondly, that under the conditions of the bond the Defendants were not liable for any advances made by *Were* and Co. to *John Cooke*, after the death of *Thomas*; and, Thirdly, that the remittances made after the death of *Thomas Cooke* ought to be first applied in reduction of the balance due at *Thomas Cooke*'s death.

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Vaughan and *Cross* Serjts. shewed cause against the rule. First, the Defendants bond is anterior to the statute of 48 *G.* 3. *c.* 149., by which a stamp of 20*l.* is imposed on bonds intended to secure the payment of a fluctuating balance which may exceed 5000*l.*, and there are no words applicable to such a bond in the statute 44 *G.* 3. *c.* 98., *the sum secured* clearly meaning, in the language of that act, the penalty. The case of *Scott* v. *Alsopp* (*a*) arose on the 48 *G.* 3. *c.* 149., and therefore does not apply to the present question; and *Pruessing* v. *Ing* (*b*) shews that additional sums accruing in the way of interest need not, with reference to the stamp-duty, be considered in computing the amount of the stamp for the principal sum. Secondly, by the express language of the condition the obligor was to be liable in respect of sums advanced to meet bills drawn by the *Cookes*, or either of them; so long, therefore, as the business continued in the hands of the *Cookes*, or either of them, and there was no partner introduced, the obligor was liable in respect of any debt which either of them might contract with *Were* and Co. There is not a word in the condition which confines the obligor's liability, to debts contracted during the joint lives of the *Cookes*. In *Lord Arlington* v. *Merricke* (*c*) the recital of the bond having stated that the principal was appointed deputy post-master for six months, it was the expressed intention of the parties that the sureties should not be liable beyond that time; but in the present instance the supposed intention of the surety is set up in opposition to his expressed intention. Admitting, however, that the obligor's liability is confined to the joint lives of the *Cookes*, then, thirdly, as the course of business between the *Cookes* and *Were* and Co. was

(*a*) 1 *Price*, 20. (*b*) 4 *B.* & *A.* 204. (*c*) 2 *Saund.* 403.

for

for the former to draw bills and make notes payable at the house of the latter, and then to make remittances to meet the advances made in respect of such bills and notes, it is clear that virtually every remittance was specifically appropriated by the *Cookes* to discharging the sum advanced on the last set of bills or notes preceding each remittance: if so, the sums remitted after the death of *Thomas Cooke* being insufficient to meet the advances made after his death, a large balance remains in respect of debts incurred before his death, upon which balance the obligor will be clearly liable.

Bosanquet, in support of his rule. First, as to the stamp, the case of *Scott* v. *Allsop*, although it arose on a statute subsequent to the date of the bond, establishes a principle which applies to the stamp act under which this bond was stamped; the principle is, that the penal sum mentioned in the bond is not the criterion for the amount of the stamp; but that criterion can only be obtained from the nature of the transaction between the parties. The penal sum here is 5000*l.*, but it was intended to be a security for a balance to a much larger amount; and if so, it ought to have been stamped with a 20*l.* stamp, under the provisions of 44 *G.* 3. *c.* 98. Sched. A. — "Bond given as a security for any sum of money exceeding 20,000*l.* — 20*l.*" This is a bond for securing money, and if so, how much? balances which might far exceed 5000*l.*, the penalty of the bond, or even 20,000*l.*

Secondly, from the condition of the bond, it appears that the obligor consented to become surety for a firm composed of the two *Cookes*. The terms of the condition clearly import, that he only proposed to render himself liable for debts contracted by the firm during the joint lives of the two partners; and it is most reasonable

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sonable that his liability should not be extended further, for he might have been induced to incur the liability by confidence in the prudence or management of the deceased partner. From the case of Lord *Arlington* v. *Merricke* (a) downwards, there is a series of decisions, and they are all collected in *Weston* v. *Barton* (b), shewing that the liability of the obligor cannot in such a case be extended beyond the joint lives of the parties, during whose connection he engaged to become bound.

Thirdly, assuming that the obligor was only liable on the balance due at the death of *Thomas Cooke*, then, as there has been no specific appropriation either by *John Cooke*, or *Were* and Co., of the remittances made afterwards, as there was not even a balance struck or a rest made in the accounts at the death of *Thomas Cooke*, the remittances subsequent to his death must be first applied in discharge of the debt of longest standing. *Bodenham* v. *Purchas*. (c) *Brooke* v. *Enderby*. (d) *Simpson* v. *Ingham*. (e)

Lord GIFFORD C. J. This is an application by the Defendants in this cause to enter a nonsuit, instead of the verdict which has been found for the Plaintiff, and if he shall fail in that application, to reduce the damages to 1*s*.

The success of the first application will depend on the construction to be put on the 44 *G*. 3. *c*. 98. The present suit has been instituted on a bond entered into by three persons, *John* and *Thomas Cooke* and *William Peareth*, in the year 1805, with a penalty of 5000*l*. conditioned for the securing any balance which might become due from the *Cookes*, who were bankers at *Sunderland*, to *Were* and Co., bankers, in *London*, upon a

(a) 2 *Wms. Saund.* 403.
(b) 4 *Taunt.* 673.
(c) 2 *B. & A.* 45.
(d) 2 *B. & B.* 70.
(e) 2 *B. & C.* 65.

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running account between them; and it is contended, that this bond should have had a 20*l.* stamp. By the 44 G. 3. c. 9. Schedule A. it is enacted, that for every bond given as a security for any sum of money not exceeding 100*l.* there shall be a stamp of 1*l.*, and so on progressively increasing in amount; and the words applicable to this bond are, "exceeding 4000*l.* and not exceeding 5000*l.* — 7*l.*" There is also an enactment, that for a bond of any kind whatsoever, not otherwise charged in the schedule, or wholly exempted from duty, there shall be upon any number of words, not amounting to thirty common law sheets, of which any such bond shall consist, a stamp of 1*l.* After the passing of this act it was discovered, that many bonds intended to secure fluctuating balances for large sums of money, did not fall within its provisions; and therefore, by 48 *G.* 3. *c.* 149. it was enacted, that for a bond given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, — where the total amount of the money secured or to be ultimately recoverable thereupon shall be uncertain and without limit, — the stamp duty shall be 20*l.*

I collect from these words, either, that the legislature thought that bonds of this description had been omitted in the 44 *G.* 3. *c.* 98., or, that if included, they must be considered as falling within the clause which provides a stamp on the amount of the penalty in the bond, or within the clause which apportions the amount of the stamp to the number of words used; and that they have, therefore, in the 48 G. 3., framed a new and express enactment, to meet what was a *casus omissus* in the the former statute. This case, therefore, is not governed by the decision in *Scott* v. *Allsop*; and it must be taken, that the stamp which has been employed was the proper stamp.

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But a more important question in this cause is, whether the Defendants are liable for advances made to the *Sunderland* bankers after the death of *Thomas Cooke*. This must turn on the construction of the instrument itself, which must be most accurately looked at for that purpose. It begins with the words "We, *John Cooke* and *Thomas Cooke*, of *Sunderland*, bankers, carrying on business under the firm of *Cooke* and Co., and *William Peareth*, are jointly and severally bound to *Patrick Craufurd Bruce*, *George Simson*, and *George Taylor*, of *London*, bankers, in the penal sum of 5000*l.*:" and the language of the condition is, "Whereas *John Cooke* and *Thomas Cooke* have applied to *P. C. Bruce*, *G. Simson*, and *G. Taylor*, to permit them the said *John Cooke* and *Thomas Cooke*, or persons authorised by them, to draw bills on *P. C. Bruce*, *G. Simson*, and *G. Taylor*, for their acceptance and payment, they the said *J. C.* and *T. C.* engaging to pay or remit to the said *P. C. B.*, *G. S.*, and *G. T.* the amount of such bills,"—"The above written obligation is such, that if *J. C.* and *T. C.* shall remit to *P. C. B.*, *G. S.*, and *G. T.* the amount of all such sums as they the said *J. C.* and *T. C.*, or either of them, or any other person authorised by them or either of them, shall draw on *P. C. B.*, *G. S.*, and *G. T.*"—"then and in such case the obligation to be void."

Now it appears that the object of the principals in this bond, and of the surety likewise, was, to secure to the *London* house the advances they might make to the *Sunderland* house, constituted as it then was of the two partners, *John* and *Thomas Cooke*. In order to extend the bond beyond this, it ought, as against the surety, to appear expressly that he proposed to render himself liable, in respect of advances made to the survivor. If such was his intention, why were not some such words as the following inserted; "at whatever time such bills shall have been drawn, whether during the partnership

or

or afterwards;"? without the addition of any such expression the words "or either of them" must be confined to the acts of either of them during the copartnership. If it had been intended to extend the acts of "either of them" beyond the copartnership, such intention ought expressly to have appeared. A principal motive for *William Peareth*'s joining as a surety might have been an opinion entertained by him as to the integrity and discretion of the deceased partner; and if he had been requested to have extended his liability beyond the life of that gentleman, he might have refused to do so. So, with respect to the liability of his own representatives, he might have been willing to charge them during the life of *Thomas Cooke*, but not afterwards.

The only remaining question is, whether on the evidence adduced at the trial, any part of the balance due from *Cooke* and Co. at the time of the death of *Thomas Cooke* is still due. Now at the time of his death no rest or distinction was made in the accounts, but they still went on as if nothing had happened, and the remittances subsequent to the death of *Thomas Cooke* are more than sufficient to cover the balance then due. Several cases have been referred to, particularly that of *Bodenham* v. *Purchas*, which establish it as a principle, that where a debtor makes no specific appropriation of a sum remitted to account, the creditor is bound to apply it in liquidation of the earliest balance due from the debtor. That principle applies here, and it was for the interest of all parties, that the remittances subsequent to the death of *Thomas Cooke* should be applied first in liquidation of the old balance. The rule, therefore, must be made absolute by the reduction of the verdict to 1*s*. damages.

PARK J. The case of *Scott* v. *Allsopp* does not apply in the present instance, because the stamp duty required

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in that case had not been imposed when this bond was executed.

As to the construction of the bond, there are circumstances which are decisive of the intention of the parties to confine the operation of it to debts contracted during the joint lives of the two *Cookes*. From the language of the condition it is apparent that the distinction between an extended and a confined liability was perceived and attended to; for the obligees are empowered to make advances, whether associated as they then were, or not; but the expression *associated or not* is entirely dropped, when mention is made of the parties who are to draw upon the obligees; so that when the obligor consented to become liable for bills drawn by *J.* and *T. Cooke*, or either of them, the words "*associated or not*" having been carefully omitted, "*either of them*" can only apply to acts done by either of them during their partnership. The case of *Weston* v. *Barton*, which decided that a surety who had bound himself as security to meet advances to be made by a certain set of obligees, was not liable in respect of advances made after one of the obligees had ceased to compose part of the firm, applies still more strongly with respect to a suretyship for debts to be contracted by several obligors. The language of *Mansfield* C. J. — "It is very probable that sureties may be induced to enter into such a security, by a confidence they repose in the integrity, diligence, caution, and accuracy of one or two of the partners," is peculiarly applicable where the confidence reposed is with reference to the contracting of debts. Where a father and a son, for instance, are connected in partnership, it is very natural that a surety who might be willing to answer for the acts of the father, might hesitate to become responsible for the son alone.

With respect to the appropriation of the sums remitted after the death of *Thomas Cooke*, this case differs from

from the case of *Simpson* v. *Ingham*, in which there was a rest and settlement of the accounts; but even there the court held, that in the absence of any specific appropriation, the sums remitted after the rest in the accounts, ought first to be applied to the liquidation of the old balance. Here, much more than was sufficient for that purpose was remitted after the death of *Thomas Cooke*, so that as to the reduction of damages the Defendants are entitled to make their rule absolute.

BURROUGH J. If there were any ground for the objection on the score of the stamp, the act of 48 *G.* 3. *c.* 149., would have been altogether unnecessary. As to the construction of the bond, when I look at the condition I entertain no doubt; if it had been intended that the surety should be liable for debts contracted after the death of one of the *Cookes*, the language of the condition ought to have been more explicit. As it stands, the rule for the reduction of damages must be made absolute.

Rule absolute accordingly.

Feb. 10.

DODINGTON v. HUDSON.

An attachment was issued against a Defendant for not *commencing* within four days (at the end of which time the attachment was moved for,) compliance with an order of court, which it would have taken him three weeks to complete.

VAUGHAN and *Taddy* Serjts. shewed cause against a rule obtained by *Pell* Serjt. for an attachment against the Defendant, for disobedience of an order of court, to reinstate the Plaintiff's premises forthwith. The affidavit on which the rule had been obtained stated, that the Defendant had taken no steps to comply with the order, although four days had elapsed since it had been served.

It appeared also, by affidavit, and it was urged on the part of the Defendant against the issuing of the attachment, that it would take three weeks to reinstate the Plaintiff's premises, and that the attachment ought not to be moved for till those three weeks had elapsed.

Sed per Curiam. The attachment is not required because the Defendant has not completed, but because he has not even commenced, a compliance with the order of the court. If you could show that you had made a beginning, the rule would not be made absolute. As no excuse is offered, the attachment must issue.

Rule absolute.

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ANNAN and Others *v.* MEABURN and Others.

Feb. 12.

In an action against a ship-owner for damage sustained by the loss of goods laden on board his ship, the extent to which he is responsible where the completion of the voyage is prevented by the tortious sale of the ship, is the value of the ship at the time of sale, and the amount of freight she would have earned had she completed her voyage, not the amount of freight calculated on at the commencement of the voyage.

THIS was an action upon the case brought by the Plaintiffs, who had by their agents shipped 72 chests of indigo on board the *Lady Banks*, at *Calcutta*, bound for *London*, against the Defendants, the owners of that ship, whereof *Isaac Vallance* was the master.

The declaration stated, that the Plaintiffs, at the special instance and request of the Defendants, delivered to them 72 chests of indigo, of the value of 7000*l.*, to be carried by the Defendants, in and by a certain ship of the Defendants, called the *Lady Banks*, from *Calcutta* to *London*, and there to be delivered to the Plaintiffs, for certain freight to the Defendants in that behalf, the dangers and accidents of the seas, and navigation of what kind soever, save risk of boats, so far as ships are liable thereto, excepted; that the Defendants received the same accordingly for such purposes; that although no dangers and accidents of the seas or navigation of any kind whatsoever prevented the safe carriage and conveyance and delivery of the said goods and merchandises as aforesaid, the Defendants not regarding their duty in that behalf, did not nor would carry and convey the said goods and merchandises from *Calcutta* to *London*, but wholly neglected and declined so to do, and on the contrary thereof they wrongfully carried the said goods and merchandises to the island of *Mauritius*, and there left the same, and that the same there became wholly lost to the Plaintiffs.

The goods were shipped at *Calcutta*, under a bill of lading in the usual form.

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The *Lady Banks* had, when she sailed from *Calcutta*, a full cargo on board, of sugar, saltpetre, indigo, and other articles, shipped on account of various persons, who had agreed to pay certain freights, in the bills of lading thereof mentioned, there being no charter-party or other contract for the voyage, and the freight of all the goods so shipped would have amounted to 2000*l*, if the goods had arrived in *London*, and had been there delivered according to the terms of the different bills of lading. The ship sailed from *Calcutta* on the 21st *December*, 1820, and anchored in *Madras* roads on the 29th of the same month, where she met with a gale of wind, from which she sustained considerable injury; she afterwards put into *Trincomalee*, in the island of *Ceylon*, to repair the damage she had sustained, and the captain there sold bags of sugar, part of the cargo, and which belonged to the Defendants; part of the proceeds of this sugar was applied in the repairs of the vessel, and the remainder of the proceeds were remitted by the captain to the Defendants. The ship sailed from *Trincomalee* on the 17th *February*, and in the progress of her voyage, by tempestuous weather, became very leaky, and 600 bags of sugar were necessarily thrown overboard, to enable her to reach a port of safety. The ship reached the *Mauritius* on the 24th of *March* in considerable distress, and with part of the cargo damaged. Soon after the arrival of the ship at the *Mauritius*, the captain petitioned the Vice-Admiralty Court for a survey, and the cargo was discharged and deposited in warehouses. The whole of the cargo then on board the vessel (except 140 chests of indigo and 30 casks of tallow) was deposited in one warehouse, and the 140 chests of indigo and 30 casks of tallow were deposited in another warehouse; a fire took place a few days after the cargo had been landed, which consumed the sugar, saltpetre, and all other parts of the cargo, except the 140 chests of indigo

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indigo and the 30 casks of tallow. The ship was afterwards, without any knowledge or privity of the Defendants, sold by public auction, after protest of abandonment by the captain, and she was repaired by the purchaser in the month of *July* following. The 140 chests of indigo and the 30 chests of tallow were afterwards also sold by public auction, by the registrar of the Vice-Admiralty Court, without any knowledge or privity of the Defendants. The action was brought to recover the value of 72 chests of indigo, part of the above 140 chests.

At the trial it was contended, on the part of the Defendants, that as ship-owners, they were not bound to repair the ship, nor were they bound to forward the indigo and tallow by another vessel, and that they were not answerable for the acts of the captain after the sale of the ship: his authority as master (as they contended) having then ceased, and the sale of the remaining cargo being his tortious act. The Chief Justice left it to the jury to consider, whether the ship ought to have been repaired, and whether the captain could have forwarded the goods by another vessel; and held, that the Defendants, as owners, were answerable for the acts of the captain, if the ship could have been repaired or the goods could have been transhipped. The jury found a verdict for the Plaintiffs generally, and stated, that they found both of the above points in the affirmative. It was then agreed that the amount of the damages should be settled by a barrister.

The Defendants contended, before the referee, that under the 53 *G.* 3. *c.* 159. they were not liable beyond the value of the ship and freight; and upon this point the referee thought they were correct.

The next question that arose was, admitting the case to be within the statute, when was the value of the ship to be taken? whether at the time the cargo was put on

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board her at *Calcutta*, or at the time the cause of action arose, *viz.* the period when the captain abandoned the voyage at the *Mauritius*, at which time, from the damage the ship had sustained, the value was considerably reduced. The referee thought that the value, at the time when the Plaintiffs' cause of action arose by the abandonment of the voyage at the *Mauritius*, was the proper value, and awarded accordingly, but stated, that if he were wrong, the verdict ought to be increased, by the addition of 2500*l.*

The remaining question was, as to the amount of what freight the owners of the ship were answerable, whether the whole freight of the goods taken on board at *Calcutta*, or only the freight of the 140 chests of indigo and 30 casks of tallow? The Plaintiffs contended, that they were entitled to claim the freight of the whole cargo; and the Defendants, on the other hand, contended, they were liable only to the extent of the freight of the 140 chests of indigo and 30 casks of tallow. The referee was of opinion the Defendants were liable only to the extent of the freight of the 140 chests of indigo and the 30 casks of tallow, and he allowed to that extent only, but stated, that if he were wrong in this, then the damages ought to be increased by the farther sum of 1900*l.*

Taddy Serjt. accordingly obtained a rule *nisi* to increase the damages to that extent.

Vaughan Serjt. shewed cause against the rule. By the 53 *G.* 3. *c.* 159. *s.* 1. the owners are not to be charged with any loss arising from any act, neglect, matter, or thing done, omitted, or occasioned without their fault or privity, further than the value of the ship, and the freight due or to grow due for and during the voyage. The

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The case of *Wilson* v. *Dickson* (a) has decided that the value of the ship is to be estimated at the time of the loss, and the principle of that decision expressly applies to the freight. If the ship had arrived in *England*, 110*l.* would have been all the freight due for the voyage, after the disasters that were encountered. The 53 *G.* 3. and the preceding statutes of 7 *G.* 2. *c.* 15. and 26 *G.* 3. *c.* 86., were intended, in case of ship owners, and to limit their responsibility, but they will be liable beyond what is required by the law of any other country, if they are to pay to the extent of freight which they can never receive.

Taddy Serjt. *contrà.* The freight ought to be calculated at the sum which the freighters were charged at the commencement of the voyage. For where, as in the present instance, there has been a jettison, all the property contributes in a general average to every one who has sustained a loss, and among other losses, that of the owner's freight is always repaired, as appears by a statement of a general average account in *Abbott on Shipping.* (b) So with respect to the goods sold, as the proceeds of the sale reached the consignees, it must be considered the same thing as if the goods themselves had arrived; and if so, the ship owners are entitled, out of these proceeds, to freight *pro ratâ itineris.* The freight due on the voyage, therefore, must be that which the ship could have earned if no peril had intervened, and for which the owner is entitled to contribution on a general average. If the law were otherwise, the owner might divest himself of all responsibility, by fixing the time of his loss; he might throw all the goods overboard, or burn them all, and then claim to be exempt from charge on the amount of freight. *Wilson* v. *Dickson* is a decision in favour of

(a) 2 *B.* & *A.* 2. (b) 4th ed. p. 372.

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the Plaintiffs; for the court, in putting an interpretation on the 53 G. 3., did not confine themselves to the literal acceptation of the words "*grow due*," and award to the Plaintiff only in respect of such sums as the owner should receive for freight at the end of the voyage, but they held him liable to the extent of what he had received in advance, although it could not be said that money so received was *due*, or to *grow due* for the voyage. So here the Plaintiff is equally liable for what is charged on account, at the commencement of the voyage. The statute means, that all sums shall be brought into account, which the owner is at any time in a capacity to charge, in respect of the voyage. By another section, the owner's responsibility in respect of the amount of freight is limited to what shall accrue within six months of the loss. But this clause would be useless if the value were at all events to be estimated at the time of the loss.

Cur. adv. vult.

Lord GIFFORD C. J. now delivered the judgment of the Court; and, after stating the case, proceeded:

This was a motion to increase the damages, with reference to the amount of freight in respect of which it is contended the owner is liable; and it has been argued, that, under the 53 G. 3. c. 159., the whole freight chargeable in respect of goods put on board in *India*, is the criterion by which the damages in this case ought to be ascertained. The 53 G. 3. enacts, "that no person or persons who is, are, or shall be owner or owners, or part owner or owners of any ship or vessel, shall be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter, or thing done, omitted, or occasioned without the fault or privity of such owner or owners, which may happen to any goods, wares, merchandise,

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or other things laden or put on board the same ship or vessel, or which may happen to any other ship or vessel, or to any goods, wares, merchandise, or other things being in or on board of any other ship or vessel, further than the value of his or their ship or vessel, and the freight due or to grow due for and during the voyage which may be in prosecution, or contracted for at the time of the happening of such loss or damage."

With respect to the ship, it is admitted, that since the case of *Wilson* v. *Dickson* the value of that must be taken at the time of the loss. As to the freight, it has been contended, that the whole freight which might have been earned, had the ship encountered no disaster, is freight growing due for and during the voyage which may be in prosecution, under the spirit of this act. But the opinion of the Court is, that by growing due, is meant, that, which under the circumstances was earned or might have been earned by the voyage in question, and that therefore the decision of the arbitrator is correct. The argument on the part of the Plaintiffs is, that the ship-owner is liable to the extent of all the freight contracted for; this, however, is not the true construction of the statute, according to which the owner is liable only to the extent of freight due at the *Mauritius*, or what might have been earned afterwards if the ship had been repaired: that was the only freight growing due for the voyage, within the meaning of the statute, and this construction of the statute is confirmed by the language of *Bayley* J. in *Wilson* v. *Dickson*.

But it has also been argued, that by the second section of 53 *G.* 3. it is enacted, "that the value of the carriage of any goods belonging to the owner of such ship, as also the hire to grow due (except only such hire as in the case of a ship hired for time, may not begin to be earned until the expiration of six calendar months after the happening of such loss or damage), shall be deemed

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and taken to be freight within the intent and meaning and for the purposes of this act;" and that in the present case there having been goods of the owners on board, which were sold at the *Mauritius*, and the proceeds remitted home, the arbitrator ought to have estimated the freight of those goods from the port of loading to the place at which they were sold. No such question was raised before the arbitrator; and the Court might with propriety confine their judgment to the questions arising on the value of the ship and the freight of the goods unsold: but assuming that this question had been debated before the arbitrator, we think he has done right in not estimating the freight on the proceeds of goods so sold, and that the point falls within the principle laid down by the Court in *Hunter* v. *Prinsep* (a), where it was holden, that where goods had been tortiously sold out of a ship before they reached their destination, the ship owners were not entitled to freight *pro ratâ itineris*, although the proceeds arising from the sale of the goods came to the hands of the consignees. With respect to the argument as to the bringing into a general average the amount of freight that would have accrued on the goods thrown overboard, we are not aware that it is the custom to do this in this country. It may perhaps be so, though it does not very distinctly appear in the calculation referred to in the respectable work on shipping, which has been cited at the bar: but even if it be so, we think it does not form any part of the freight due or to accrue due within the meaning of the 53 G. 3.

Rule discharged.

(a) 10 *East*, 378.

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A misdescription of the person to whom a licence from the crown is granted to trade with the enemy, does not invalidate the licence.

THIS was an action of assumpsit on a policy of insurance made 30th *August*, 1810, at and from *Heligoland* to any port or ports in the *Baltic* and *Gulph of Finland*, against all risks, including the risk of craft, and until safely warehoused in the warehouse of the consignees, at the final ports or places of discharge, with liberty to carry and exchange real or simulated papers and clearances, and to seek, join, and exchange convoys or ship or ships, with leave to proceed and sail to, and touch and stay at, any ports or places whatsoever, and to touch, stay, discharge, and re-load cargoes at any port in *Sweden*; and to wait for orders, and for any purposes whatsoever, at or off any ports or places they might touch at, and to return to any port or ports without being deemed a deviation. At the foot of the policy was the following memorandum: "On goods as shall be declared and valued hereafter," and indorsed on the policy was a declaration particularizing the goods, and valuing them at 10,150*l.*, and the insurance was declared to be on such goods, per the *Vrouw Hendricka*, captain *Hendricks*. The Plaintiff declared as for a total loss. The Defendant pleaded the general issue, *non assumpsit*.

This cause came on to be tried at the sittings at *Guildhall*, after *Michaelmas* term, 1821, before *Dallas* C. J., when a verdict was found for the Plaintiff, damages 500*l.*, subject to the opinion of the Court on the following case:

The Plaintiff was a merchant at *Hanover*, and a native of that country, and at the time of effecting the policy,

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policy, of granting the license of the voyage, and of the loss, was residing within the *Hanoverian* dominions. The Plaintiff, in 1810, was the owner of goods then lying at *Heligoland*, consisting of *British* colonial produce, which had been imported thither from this country, and were then in the possession of his agents there.

The island of *Heligoland* was captured by the *British* forces in 1809, and has since continued under the dominion of *Great Britain*.

The Plaintiff having resolved to send these goods to some of the neutral ports in the *Baltic*, employed as his agent for that purpose *Charles Frederick Hampe*, and sent him to *Heligoland* in that character. *Hampe* was a merchant, and was then on the point of coming to reside in this country, and had given instructions to his correspondents to procure him a residence here. The Plaintiff, in *August* 1810, wrote to one *Frederick Klingender*, his agent in *London*, instructing him to effect an insurance to cover the adventure, and in consequence thereof, and prior to any vessel being chartered, *Klingender* effected the policy declared upon, which the Defendant subscribed for 500*l.* Upon *Hampe*'s arrival at *Heligoland* he wrote to *Klingender*, directing him to charter a vessel and send her to *Heligoland*, for the purpose of loading her with the Plaintiff's goods; and he also directed *Klingender* to procure and send him a licence. *Klingender* accordingly on the 27th of *August*, 1810, chartered the *Vrouw Hendricka*, a neutral vessel, and, by the terms of the charter party, she was to proceed to the island of *Heligoland*, or so near thereunto as she might safely get, and then load a complete cargo of lawful and permitted merchandize, and being so loaded, therewith to proceed to a port in the *Baltic*, but not higher up than *Koningsberg* and deliver the same. *Klingender* also in pursuance of his instructions applied

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for and obtained the following order in council, and licence:

"At the Council Chamber, Whitehall, the 28th day of *August*, 1810.

"Present,

"The Lords of His Majesty's most Honourable Privy Council.

"(Duplicate.)

"Whereas there was this day read at the board the humble petition of *C. F. Hampe*, of *London*, merchant, It is ordered in council that a licence be granted to the petitioner for permitting a vessel bearing any flag except the *French*, to proceed with a cargo of *British* manufactures, colonial produce, and such goods as are permitted to be exported from *Heligoland*, to any part in the *Baltic* not under blockade, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any other neutral or hostile port, and to whomsoever such property may appear to belong, upon condition that the name and tonnage of the vessel, name of her master, and time of her clearance from *Heligoland*, shall be indorsed upon the said licence; and that a certificate from the proper officer of the customs at *Heligoland* shall accompany the cargo, certifying that the same was originally exported from the United Kingdom; such licence to remain in force for four months from the date hereof; and at the expiration of the same period, or sooner if the voyage be completed, to be deposited, as the case may be, with the commissioner of his majesty's customs at the port of *London*, or with the collectors of the customs at the out-ports. And the Right Honourable *Richard Ryder*, one of his majesty's principal secretaries of state, is hereby specially authorized to grant such licence,

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licence, in case he shall see no objection thereto, annexing to such licence the duplicate of this order, herewith sent for that purpose.

"*Chetwynd.*"

"To all Commanders of His Majesty's Ships of War, Privateers, and all others whom it may concern, greeting.

"I, the undersigned, one of his majesty's principal secretaries of state, in pursuance of the authority given to me by his majesty, by order of council, under and by virtue of power given to his majesty by an act passed in the 48th year of his majesty's reign, — intituled 'an act to permit goods secured in warehouses in the port of *London*, to be removed to the out-ports for exportation to any part of *Europe*, for empowering his majesty to direct that licences which his majesty is authorized to grant under his sign manual, may be granted by one of his majesty's principal secretaries of state, and for enabling his majesty to permit the exportation of goods in vessels of less burthen than are now allowed by law, during the present hostilities, and until one month after the signature of the preliminary articles of peace," — and in pursuance of an order of council especially authorising the grant of this licence, a duplicate of which order of council is hereunto annexed, do hereby grant this license for the purposes set forth in the said order of council to *C. F. Hampe* of *London*, merchant, and do hereby permit a vessel bearing any flag except the *French* to proceed with a cargo of *British* manufactures, colonial produce, and such goods as are permitted by law to be exported from *Heligoland* to any port in the *Baltic* not under blockade, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined

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tined to any neutral or hostile port, and to whomsoever such property may appear to belong; provided that the name and tonnage of the vessel, name of her master, and time of her clearance from *Heligoland* shall be indorsed on this licence, and that a certificate from the proper officer of the customs at *Heligoland* shall accompany the cargo, certifying that the same was originally exported from the united kingdom. This license to remain in force for four months from the date hereof, and at the expiration of the said period, or sooner, if the voyage be completed, this license shall be deposited, as the case may be, with the commissioners of his majesty's customs at the port of *London*, or with the collector of the customs at the out-ports.

"Given at *Whitehall*, the 28th day of *August*, 1810, in the fiftieth year of his majesty's reign.

"*R. Ryder.*"

The indorsements required by the license were duly made, and also certificate from the proper officer of the customs at *Heligoland*, as required by the license. The *C. F. Hampe* named in the order of council and license was the same person as the *C. F. Hampe* employed by the Plaintiff as above stated.

The vessel then proceeded to *Heligoland*, and upon her arrival there the goods specified in the policy were shipped on board by *Hampe*, the goods being the property of the Plaintiff, and of the value stated in the policy. On the 17th *September* 1810, the vessel with her cargo sailed under convoy from *Heligoland*, *Hampe* being on board of her as supercargo, bound for *Swinemunde* in the *Prussian* dominions. On the 31st *October*, 1810 she arrived with her said cargo in the roads of *Swinemunde*, and soon after her arrival the vessel and her cargo were seized by a *Prussian* military force, and were subsequently condemned by the public authorities at

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Swinemunde, and the cargo became wholly lost to the Plaintiff.

Before any of these circumstances had taken place *Hanover* was taken possession of in a hostile manner by the *French* troops, and during the whole period of the abovementioned transactions the powers of government were exercised in *Hanover* by *Jerome Buonaparte*, the brother and ally of *Napoleon Buonaparte*, who was then at the head of the *French* government and at war with this country, *Jerome Buonaparte* having assumed the title of king of *Westphalia*, and *Hanover* having, on the 10th *July* 1810, been declared by *Napoleon Buonaparte* a department of such kingdom of *Westphalia*: but these acts were never recognized by the government of this country, nor was any cession of *Hanover* made, nor any war declared between *Hanover* and this country.

The Plaintiff upon the trial called as a witness a clerk from the council-office, who produced several original petitions, orders in council, and licenses thereupon granted about the time of the granting of the license in question; in some of which petitions, orders in council, and licenses, the residence of the petitioners was not stated; in others even the names of the persons intended to be interested were wholly omitted; and the petitions were stated to have been presented "on behalf of different merchants," without specifying either their names or national character: and further, the Plaintiff offered to prove by the same clerk, that at the time when the license in question in this action was granted, the residence of the petitioner was not considered a material circumstance at the privy council board, which he was ready to verify upon his own personal knowledge of the course of business, and also by the production of the council books, in which the applications for licenses and the minutes of decisions thereon were entered.

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The Defendant objected that neither the other petitions and licenses, nor the parol testimony as to the practice and understanding at the council board were admissible.

The Plaintiff insisted that the proposed proof was admissible, and ultimately it was agreed that it should be made one of the points for the consideration of the court upon the special case, whether the proposed evidence was competent or not.

The general question for the opinion of the court was, Whether the Plaintiff was entitled to recover? If the court were of that opinion the verdict was to stand; if not, the verdict was to be set aside and a nonsuit entered: either party to be at liberty to turn the case into a special verdict.

Taddy Serjt., for the Plaintiff. The Defendant relies on the case of *Klingender* v. *Bond* (*a*), which is a decision on the same policy on which this action arises, and in which the court held that the description of *Hampe*, as a merchant of *London*, when in fact he did not reside there, was a fatal objection to the Plaintiff's claim. But that case was decided without much argument, upon a motion for a new trial: after that time the opinions of the courts, with respect to these licences, entirely changed, and it became the practice to give the most liberal and extended construction to them, when it was found that the trade of the country could not be carried on without them. *Flint* v. *Scott* (*b*), *Morgan* v. *Oswald* (*c*), case of the *Good Hope* (*d*), case of the *Vrow Cornelia.* (*e*) The Plaintiff being a *Hanoverian* was not an alien enemy, nor even an alien, (*Calvin*'s case (*f*), so that

(*a*) 14 *East*, 484.
(*b*) 5 *Taunt.* 674.
(*c*) 3 *Taunt.* 554.
(*d*) *Edw. Adm. Cases*, 7.
(*e*) *Ib.* 24.
(*f*) 7 *Rep.* 9 *b.*

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the object of this license was not to remove any disability of the person, but a disability affecting the ship; and most of the preceding decisions on the subject of licenses have turned on disabilities existing in the person of the grantee. To what an extent the decisions have been carried in overlooking even disabilities of the person, appears from *Robinson* v. *Touray* (a), *Bazett* v. *Meyer* (b), *Hagedorn* v. *Reid* (c), *Usparicha* v. *Noble.* (d) But the licence in the present case has no object beyond the ship, and no limitation in respect of ship, except as to the *French* flag. There can be only two grounds for contending that this licence was intended for a *London* merchant; one, that the property to be conveyed was the property of a *London* merchant; the other, that the ship belonged to the port of *London*, but both these suppositions are negatived by the language of the licence itself. Even if it were otherwise, the supposed misdescription amounts to nothing; the grantee is described as of a place at which he was about to reside, and even in a deed this would be sufficient. The evidence which has been excluded was not necessary to the support of the Plaintiff's case, and may therefore be at once abandoned.

Vaughan Serjt., for the Defendant, relied on the case of *Klingender* v. *Bond*; he contended that a true description of the person of the grantee was necessary to make the government acquainted with the nature of the enterprize, and to ascertain that it was not a cover for hostile purposes, and he cited *Warin* v. *Scott* (e), and *Busk* v. *Bell* (f) to shew that there ought to be in every licence a true description of the person of the grantee.

(a) 1 *M.* & *S.* 217.
(b) 5 *Taunt.* 824.
(c) 1 *M.* & *S.* 567.
(d) 13 *East*, 332.
(e) 4 *Taunt.* 605.
(f) 16 *East*, 3.

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Taddy Serjt., in reply, observed, that *Warin* v. *Scott* was the case of an alien enemy, residing in *Great Britain*, who had a very special licence to enable him to travel from one part of the kingdom to another, so that an accurate personal description was absolutely necessary, and he cited the case of *Cousine Mary Anne* (a) to shew that in the Admiralty Courts a plea of alien enemy was not allowed where the licence was for property, to whomsoever it might *appear* to belong.

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Lord GIFFORD, C. J. now delivered the judgment of Court, and after stating the case, proceeded as follows:

The question with regard to the admissibility of the testimony of the clerk from the privy council office having been abandoned, the only question is, whether the licence, having been granted to *Hampe* by the description "of *London*, merchant," and the case having found, that at the time of the licence being granted he intended to come to reside in *London*, though he had not then actually come, this misdescription, if any, vitiates the licence. The same question came before the Court of King's Bench in the year 1811 in the case of *Klingender* v. *Bond*, in which the Plaintiff was nonsuited, on the ground of this misdescription; and upon a motion to set aside this nonsuit, on which occasion the point did not undergo any great degree of discussion, Lord *Ellenborough* retained the same opinion as he had pronounced upon the trial of the cause. It is true, that at an early period of the issuing these licences, Lord *Ellenborough* and the Courts were disposed to construe them strictly, as being in the nature of grants from the crown, but that opinion did not ultimately prevail; it was soon considered that the object of the licences was to facilitate

(a) *Edwards*, 21.

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the commerce of the country, and that they ought therefore to receive a liberal construction; and various cases were decided which strongly confirm this view of the subject. In *Morgan* v. *Oswald* it was holden that a licence to a *British* merchant for a ship to go to a hostile port, and bring home a cargo of goods, authorised the importation of such goods, being the property of an alien enemy, subject of that hostile country, and therefore authorised him to insure, and enforce his contract of insurance in our courts. In *Warin* v. *Scott*, indeed, it was holden that a licence, authorising the exportation of goods by *Van Buuren* and *Kanningeisser*, or other *British* merchants, would not protect the exportation of those goods by *Van Eyche*, an alien enemy, whose licence to reside in this country had expired; but in *Hagedorn* v. *Reid*, it was decided that a licence to *J. P. Hagedorn*, of *London*, merchant, on behalf of himself or other *British* or neutral merchants, would protect a ship in which *Hagedorn* and an alien enemy were jointly interested; and this was decided on the same principle as *Morgan* v. *Oswald*, namely, that the licence was intended to legalize a commerce beneficial to the country, without regard to the individuals engaged in that commerce. In *Edward's Admiralty Cases*, there are several other cases to the same effect. Now, first, was there any fraud intended or committed in the present instance? The grantee, it is true, is described as of *London*, merchant, at a time when he had not yet arrived in *London*, though he actually purposed to reside there; but the object of the licence was simply to legalize the adventure, under the provisions of an order in council, and the conditions imposed in the licence are applicable, not to the person, but to the ship; those conditions are, that the name and tonnage of the vessel, the name of her master, and time of her clearance from *Heligoland*, shall be indorsed upon the licence, and that a cer-

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a certificate from the officer of the customs at *Heligoland* shall accompany the cargo. All those conditions have been complied with; and as to the description of the merchant, it is not found that he intended to remain at *Heligoland*, but on the contrary, that he had a fixed intention of coming here. Now as these instruments are to receive a liberal construction, as the object of them is to legalize the adventure rather than to qualify the party applying, it appears to us, with all deference to the decision in *Klingender* v. *Bond*, upon considering the subsequent cases, in which these licences have been viewed with less rigor, that the misdescription in the present instance does not vitiate the licence, and that the Plaintiff is entitled to recover.

Judgment for Plaintiff accordingly.

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Under a devise of the rectory or parsonage of *M*, with the messuages, lands, &c. *thereunto belonging*: Held, that lands passed which had been acquired by the owners of the rectory between the fifth year of *James* the First and 1632, and had always afterwards been occupied with the rectory

THIS was an action of covenant upon an indenture of lease, bearing date the 30th *August*, 1804, and made between one *William Hopson* of the one part, and the Defendant of the other part, of certain premises particularly mentioned in the lease for the term of twenty-one years from *Michaelmas* day then last past, at the yearly rent of 1230*l.*; and the Plaintiff in his declaration made title to the said premises as assignee of the reversion thereof, under the will of *William Hopson*. The Defendant pleaded, " that the said *W. Hopson* did not by his last will and testament give and devise the said reversion of, and in the said demised premises

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with the appurtenances to the said *Thomas Moulden* and *John Chambers*, and their heirs, to hold as therein mentioned, in manner and form, &c.;" upon which issue was joinded.

At the trial before *Park* J., at the *Middlesex* sittings after *Michaelmas* term, 1821, a verdict was taken for the Plaintiff for 1230*l.* by the consent of the counsel on both sides, subject to the opinion of the Court on the following case.

By indentures of lease and release bearing date the 24th and 25th days of *December*, 1789,

All that, the rectory or parsonage of *Minster*, in the isle of *Sheppey*, in the county of *Kent*, and all that messuage or tenement called or known by the name of the *Parsonage-house*, of *Minster* aforesaid, together with the barns, stables, outhouses, edifices, buildings, closes, yards, gardens, several pieces of arable, meadow, pasture, and marsh land following, that is to say: All that piece or parcel of land, commonly called or known by the name of *Platt*'s *Land*, containing, &c. The two pieces of meadow land before *Platt*'s *Land*, containing, &c.: the piece of land commonly called or known by the name of *Holland*'s, containing, &c.: one other piece or parcel of land, commonly called or known by the name of *Upper Burston*'s, containing, &c.: one other piece or parcel of land commonly called or known by the name of *Lower Burston*'s, containing, &c.: one other piece or parcel of meadow land lying before the said messuage or tenement, containing, &c.: one other piece or parcel of land commonly called or known by the name of *Barton-hill*, containing, &c.: one other piece or parcel of land commonly called or known by the name of the *Further Barton-hill*, containing, &c.; The *New Grounds*, containing, &c.; one other piece or parcel of land commonly called or known by the name of *Sharden*'s, containing, &c.; and also, all that messuage, tenement, or

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cottage, with the yard, garden, and piece or parcel of meadow land thereto belonging, commonly called the *Shoulder of Mutton* piece, containing, &c. with the appurtenances: and also, all that piece or parcel of fresh marsh land, commonly called or known by the name of the *Ferry Marsh*, containing, &c. with the appurtenances; all which said several pieces or parcels of land contain together in the whole by estimation 198 acres, be thereof more or less with the appurtenances, and are with the said messuage or tenement, cottage and premises aforesaid, situate, lying and being in the said parish of *Minster*, in the isle of *Sheppey* aforesaid, and were formerly in the tenure or occupation of *John Gore*, Esq., afterwards of *John Baker*, afterwards of *George Evans Baker*, afterwards of *John Hopson*, and now of the said *William Hopson*, his assigns or under-tenants; and also, all and all manner of tithes, oblations, and obventions, yearly and every year, growing, renewing, and arising within the said parish of *Minster*, together with all and all manner of houses, &c. to the said messuages or tenements, cottage, rectory, parsonage, lands, hereditaments, and premises belonging, or in any way appertaining, accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, save and except, and always reserved thereout unto the releasors, the donation, right of presentation, and patronage to the curacy of the said parish and parish church of *Minster* aforesaid, and which was not meant and intended to be granted and conveyed; and the reversion, &c. were conveyed unto, and to the use of the said *William Hopton*, his heirs and assigns for ever.

It appears, that in the fifth year of the reign of *James* the First, the several lands hereinbefore specified did not form part of the rectory or parsonage of *Minster*, as on the 13th of *November*, in the fifth year of that king, by indentures of bargain and sale inrolled in Chancery,

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Chancery, *Sir James Cromer*, and *Dame Martha* his wife, sold and conveyed the rectory or parsonage in question to Sir *Edward Hales*, Baronet, and *John Hales*, Esq., his son and heir apparent, by the following description.

"All that the rectory or parsonage of *Minster*, with the appurtenances, in the isle of *Sheppey* or elsewhere, in the said county of *Kent*, and all and singular houses, buildings, glebe lands, tenths, meadows, pastures, waters, fishings, tithes, oblations, obventions, commodities, profits, emoluments, and hereditaments whatsoever, to the same rectory or parsonage belonging or appertaining; and all and singular the liberties, franchises, rights, royalties, jurisdictions, pre-eminences, and hereditaments of the said *James Cromer*, to the same rectory or parsonage appertaining or belonging, or as part, parcel, or member, or in or by reason of the same, or any part thereof, lawfully used, reputed, taken, occupied, or enjoyed: And that messuage or tenement, barn, and twelve acres by estimation of land in *Minster* aforesaid, with the appurtenances, late *Christopher Tilman*'s, and before *Matthew Hadd*, Esq's., abutting upon lands there called *Barton-hill* towards the east, to lands there called *Jacob*'s and *Henberry*'s towards the south, to lands now or late *Henman*'s, towards the west, and to lands now or late *Batchelor*'s called *Holland*'s towards the north, now or late in the occupation of *Thomas Hatch* or his assigns, which said messuage, barn, and twelve acres before mentioned, are holden of our sovereign lord the king's majesty, as of his manor of *Mylton*, alias *Middleton*, in fee soccage and not otherwise."

Between the date of this indenture of bargain and sale, in the fifth year of the reign of *James* the First, and 1632, the several pieces of arable, meadow, pasture, and marsh land, called *Platt's Land*, the two pieces of meadow land before *Platt's Land*, the piece of land

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called *Holland's*, the piece of land called *Upper Burston's*, the piece of land called *Lower Burston's*, the piece of meadow land lying before the said messuage or tenement, the *Springs*, *Barton-hill*, the *Further Barton-hill*, the *Shardens*, the *Shoulder of Mutton* piece, and the *Ferry Marsh*, were purchased in fee simple by the several and successive owners of the rectory or parsonage of *Minster*, and have been occupied together both before and since the purchase made by the testator as hereinafter set forth.

And by an indenture of lease bearing date the 28th *August*, 1747, *John Gore* being then seized in his demesne as of fee of and in all and singular the said messuages, lands, and premises comprised in the indentures of lease and release to the said *William Hopson*, of the 24th and 25th *March*, 1789, demised and let the same, except the piece of land called the *Ferry Marsh*, to *John Baker* for a certain time mentioned in the said indenture of lease, and now expired by the following description, *viz.*: "All that messuage or tenement, with the barns, stables, outhouses, lodges, yards, closes, gardens, and appurtenances, commonly called or known by the name of the *Parsonage*; and also, all those several pieces or parcels of land thereunto belonging, commonly called or known by the several names of *Platt's Land*, the two meadows below *Platt's Land*, *Holland's*, *Upper Burston's* *Lower Burstons*, the meadow before the house, the springs behind the house, *Barton-hill*, *Further Barton-hill*, the *New Grounds*, and *Shardens*, containing together in the whole by estimation 188 acres more or less, which said messuage or tenement and several pieces of land are situate, lying, and being in *Minster* aforesaid, and are now in the occupation of the said *John Gore*, his assigns or under-tenants: and also, all that other messuage or tenement with the outhouses and appurtenances, formerly called the *Shoulder of Mutton*, together with the meadow behind the same thereunto belonging,

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longing, containing, &c. situate, lying, and being in *Minster* aforesaid, and now or late in the tenure or occupation of *Robert Bowyer*, his assigns or under-tenants: and also all the glebe land and tithes of corn, grain, and hay, and all other tithes called great tithes; and also all the tithes of seeds, pasture and feeding, and all other tithes called small tithes, and all compositions, &c."

And by a certain other indenture of lease bearing date the 7th *September*, 1765, *William Gore* being then seized in his demesne as of fee of and in all and singular the same messuages, lands, and premises demised, and let the same to one *John Hopson* for a certain term mentioned in the said indenture of lease, and now expired by the following description, *viz.*: "All that messuage or tenement with the barns, stables, outhouses, lodges, yards, closes, gardens, and appurtenances, commonly called or known by the name of the *Parsonage*: and also all those several pieces or parcels of land thereunto belonging, commonly called or known by the several names of *Platt's Land*, the two meadows before *Platt's Land*, *Holland's*, *Upper Burton's*, *Lower Burton's*, the *Meadow before the House*, the *Springs behind the House*, *Barton-hill*, *Further Barton-hill*, the *New Grounds*, and *Sharden's*, containing together in the whole by estimation 188 acres more or less, which said messuage or tenement and several pieces of land are situate, lying, and being in *Minster* aforesaid, and were heretofore in the tenure or occupation of *John Gore*, Esq., afterwards of *John Baker*, late of the said *William Gore*, and now of the said *John Hopson*, his assigns or under-tenants: and also all that other messuage or tenement, with the outhouses and appurtenances, formerly called the *Shoulder of Mutton*, together with the meadow behind the same or thereunto belonging, containing, &c. situate, lying and being in *Minster* aforesaid, and now or late

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in the tenure or occupation of *Robert Bowyer*, his assigns or under-tenants: and also all that piece or parcel of marsh land called the *Ferry Marsh*, lying in *Minster* aforesaid, containing, &c., and now or late in the tenure or occupation of *Thomas Randall*, or his assigns or under-tenants: and also all the glebe land, and tithe of corn, grain, and hay, and all other tithes called great tithes; and also all the tithes of seeds, pasture, and feeding, and all other tithes called small tithes, of what nature or kind soever, and all compositions, &c.

Prior to the purchase by *William Hopson* of the several premises comprised in the indentures of lease and release of the 24th and 25th *March*, 1789, the said *William Hopson* had, by indentures of lease and release, dated 14th and 15th *April*, 1783, also purchased in fee-simple certain other premises called *Poor's Farm*, *Ripney-hills*, and *Horse Marsh*; and by the said indenture of lease of the 30th *August*, 1804, and made between *William Hopson* and the Defendant, *Willam Hopson*, being then seised in his demesne as of fee of and in all and singular the premises comprised in the same lease, demised and let unto the Defendant for a certain term of years, yet unexpired, as well all and singular the premises comprised in the indentures of lease and release of the 24th and 25th *March*, 1789, as also the premises called *Poor's Farm*, *Ripney-hills*, and *Horse-marsh*, (purchased as before mentioned by the conveyances of the 14th and 15th *April*, 1783,) by the following description: All that messuage or tenement with the barns, stables, outhouses, lodges, yards, closes, gardens, and appurtenances, commonly called or known by the name of the *Parsonage*, and also all those several pieces or parcels of land thereunto belonging, commonly called or known by the several names of *Platt's Land*, the two meadows before *Platt's Land*, *Holland's*, *Upper Burston's*, *Lower Burston's*; the meadow before the house, the meadow and springs behind the house, *Barton-hill*, *Further Barton-hill*; the

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New Grounds, and *Sharden's*, containing &c. 188 acres, which said messuage or tenement and several pieces of land are situate, lying, and being in *Minster* aforesaid, and were heretofore in the tenure or occupation of *John Gore*, Esquire, afterwards of *John Baker*, then of *William Gore*, and afterwards of *John Hopson*, his assigns or under-tenants, late of the said *William Hopson*, his assigns or under-tenants, and now of the said *John Chambers*, his assigns or under-tenants: and also all that other messuage or tenement, with the out-houses aud appurtenances, formerly called the *Shoulder of Mutton*, together with the meadow behind the same, or thereunto belonging, containing &c., situate, lying, and being in *Minster* aforesaid, and heretofore in the tenure or occupation of *Robert Bowyer*, his assigns or under-tenants, and now of the said *John Chambers*, his assigns or under-tenants: and also all that piece or parcel of marsh land called the *Ferry Marsh*, lying in *Minster* aforesaid, containing &c., heretofore in the tenure or occupation of *Thomas Randall*, or his assigns or under-tenants, and now or late of the said *John Chambers*, his assigns or under-tenants; and also all the glebe land and tithes of corn, grain, and hay, and all other tithes called great tithes; and also all the tithes of seeds, pasture, and feeding, and all other tithes called small tithes, of what nature or kind soever, and all compositions, oblations, offerings, and other titheable things which shall at any time during the term of years hereinafter granted, grow, arise, be, and increase within the parish of *Minster* aforesaid, or the titheable places thereof, with the appurtenances.

The before-mentioned premises, contained in the said purchase-deeds of the 24th and 25th *March*, 1789, were rated together to the land-tax in the following words: " The parsonage of *Minster*, consisting of the great and small tithes in the parish of *Minster*, together with a messuage

messuage and cottage, two barns, two stables, and arable and pasture lands;" and which land-tax *Hopson* redeemed in the year 1799, together with the land-tax of his other estates in the county of *Kent*, as appears by the certificate.

On the 17th *February*, 1817, *William Hopson*, being then seised in his demesne as of fee of and in all the messuages, lands, and premises, comprised in the last-mentioned indenture of lease, made and published his last will and testament in writing, duly executed and attested, so as to pass real estates, and thereby, amongst other things, gave and devised as follows: that is to say,

I give and devise unto *Thomas Moulden*, of *Bermondsey*, wool-stapler, and *John Chambers*, of *Minster*, gentleman, and their heirs, all that the rectory or parsonage of *Minster*, in the isle of *Sheppy*, in the said county of *Kent*, with the messuages, lands, tenements, tithes, hereditaments, and all and singular other the premises *thereunto belonging*, with their and every of their rights, members, and appurtenances: and also all that messuage or tenement and farm, called or known by the name of *Poor's Farm*, with the barns, stables, backsides, yards, garden, and several pieces or parcels of land thereunto belonging, containing, &c., with the appurtenances, situate, lying, and being in *Minster* aforesaid, and now in the occupation of the said *John Chambers*, his assigns or under-tenants: and also all those several pieces or parcels of arable, pasture, and meadow land, called or known by the name of *Ripney-hills*, and two pieces or parcels of meadow or marsh land thereto belonging, containing, &c., situate, lying, and being in the parish of *Minster* aforesaid, and now in the tenure or occupation of the said *John Chambers*, and the executors of *Richard Ingleton*, deceased, their assigns or under-tenants: and also all that piece or parcel of marsh land called or known by the name of *Horse Marsh*, containing,

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ing, &c., situate, lying, and being in the parish of *Minster* aforesaid, and now in the occupation of the said *John Chambers*, his assigns or under-tenants: to hold the said rectory, and all and singular the said several hereditaments and premises, with their appurtenances, unto the said *Thomas Moulden* and *John Chambers*, their heirs and assigns, to the use and for the intent and purposes hereinafter mentioned, that is to say, to the use, tent, and purpose that my loving wife, *Elizabeth Hopson*, and her assigns, may have, receive, and take thereout, during her natural life, one annuity or clear yearly rent charge of 500*l*. of lawful *British* money, the same to be paid and payable free from all taxes and other deductions whatsoever by four equal quarterly payments; (The will contained the usual power of distress and entry;) nd subject to the said annuity or yearly sum of 500*l*. and to the powers and remedies hereby given for the enforcing and securing the payment of the same, I will and direct that the said rectory, parsonage, messuages, lands, farms, tenements, tithes, hereditaments, and premises aforesaid, so charged therewith, with the appurtenances, shall be and remain, and I hereby give and devise the same to the use of *William Ongley* (the Plaintiff) for andduring his natural life without impeachment of waste with remainders over.

The testator was also possessed of or entitled to considerable other real estates besides the lands comprised in the indenture of lease of the 30th *August*, 1804, all of which estates he devised specifically to different persons named in his will, and then followed this residuary clause. " And as to all the residue and remainder of my goods, chattels, ready money, securities for money, real and personal estate and effects whatsoever and wheresoever, (but as to my personal estate, subject to the payment thereout of all and every my just debts, funeral and testamentary expences, and the several

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legacies hereinbefore given and bequeathed,) I give and bequeath the same, and every part thereof, unto *William Nettlefold*, *Edward Nettlefold*, *Thomas Moulden*, and *John Chambers*, their several and respective heirs, executors, and administrators respectively, according to the value and equality thereof, equally to be divided between them, share and share alike, and to take as tenants in common and not as joint-tenants."

It was admitted on the trial, that if *Platt's Land*, the two pieces of meadow land before *Platt's Land*, the piece of land called *Holland's*, the piece of land called *Upper Burston's*, the piece of land called *Lower Burston's*, the piece or parcel of meadow land lying before the said messuage or tenement, the *Springs*, *Barton-hill*, the *Further Barton-hill*, the *Shardens*, the *Shoulder of Mutton* piece, and the *Ferry Marsh*, were included in the devise to the Plaintiff, the said testator had no other "real estate" wherewith to satisfy these words in the devise of the general residue of his real and personal estate.

Some memorandums in the handwriting of the testator were offered in evidence on the part of the Plaintiff, and objected to. If the Court should be of opinion they were admissible, they were to become part of the case, otherwise not.

The question for the opinion of the Court was, whether the Plaintiff was entitled to recover any, and what sum; and if so, a verdict was to be entered accordingly; if otherwise, a verdict was to be entered for the Defendant.

The case was argued by *Vaughan* Serjt. for the Plaintiff, and *Taddy* Serjt. for the Defendant.

On the part of the Plaintiff, Under the devise of the rectory or parsonage with the lands thereunto belonging, were claimed all the lands specified in the deed of 1789, as having usually been occupied with the

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rectory. It was admitted that, strictly and technically speaking, land could not be an appurtenant to a messuage, though in this respect it was contended there might be a distinction between an ordinary messuage and a rectory; a distinction was also insisted upon between appurtenances, and lands appertaining or belonging to; between the technical expressions *cum pertinentiis* and *cum terris pertinentibus*, *Herne* v. *Allen* (a); and it was urged, that even in a deed much would pass under the latter expression which would not pass under the former; but the argument mainly relied on, was, that in a will the words "thereunto belonging" must be construed as *usually occupied therewith*, giving to the word *belonging* its popular instead of its technical sense; and for this position were cited *Hill* v. *Grange* (b), *Gennings* v. *Lake* (c), *Maund's* case (d), *Knight's* case (e). In anticipation of the argument, that according to this construction, there would be no land left to pass under the residuary clause, the case of *Marshal* v. *Hopkins* (f) was referred to, where it was holden, that property to meet the residuary clause was not always required, that clause being usually inserted by way of caution. The question with respect to the memorandums was abandoned.

For the Defendant it was argued, that the words "thereunto belonging" ought not to be taken in their popular sense, unless it were impossible to make them operative in their restricted and technical sense. This, it was contended, was the result of the principle laid down in the various cases cited on the part of the plain-

(a) 1 *Cro. Car.* 57.
(b) 1 *Plowd.* 170. *Dyer*, 130. *b.*
(c) *Cro. Car.* 168.
(d) 7 *Rep.* 112.
(e) *Godb.* 352. *Palm.* 375.
(f) 15 *East*, 309.

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tiff, as well as in the more recent cases of *Doe dem. Chichester* v. *Oxenden* (a), *Doe dem. Beach* v. *Jersey* (b), *Clements* v. *Lambert.* (c) That, not only was there sufficient in this will to make the words operative in their technical sense, but that, taking the whole record before the Court, it would be impossible to apply them in the popular sense of "usually occupied with," because upon the record the Court could not determine what lands had usually been occupied with the rectory and what not, the word *belonging* being employed in different senses in the different deeds set out; for instance, including the *Ferry Marsh* in the deed of 1747, not including it in the deed of 1765. It was admitted, however, that the twelve acres, if they could be pointed out, would pass with the rectory under the words *thereunto belonging*, because they appeared to have belonged to it in the time of *James* First, and to have been invariably occupied with it ever since.

LORD GIFFORD C. J. now delivered the judgment of the Court, and after stating the case, and observing that the question respecting the admissibility of the memorandums had been abandoned at the bar, proceeded as follows:

The question raised in this case, is, what has passed under the first part of *William Hopson*'s will, by which he devises to *Thomas Moulden* and *John Chambers*, and their heirs, "all that the rectory or parsonage of *Minster*, in the isle of *Sheppey*, with the messuages, lands, tenements, tithes, hereditaments, and all and singular other the premises thereunto belonging." It is contended on the part of the Plaintiff, that under this description, which precedes the mention of the *Poor's Farm*, *Ripney-hills*, and the *Horse Marsh*, are included

(a) 3 *Taunt.* 147. (b) 1 *B. & A.* 550. (c) 1 *Taunt.* 206.

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all the lands comprised in the indentures of lease and release of *December* 1789. It is contended on the part of the Defendant, that none of them passed as lands belonging to the rectory. It has been agreed by the counsel on both sides, that the words "thereunto belonging" are not in a will to be construed with the same strictness as in a conveyance, but may receive, if the Court deem it requisite, a wider construction; and there are many cases decided on wills which authorise a wider construction, even with regard to words much more technical than those now in dispute. It has been agreed, too, that although land cannot, strictly speaking, be said to be appurtenant to land, yet that in a will it may pass under such a description; and in *Hill* v. *Grange*, which was a decision upon a deed, and therefore a stronger case than the present, a party having leased a messuage, with all the lands to the same appertaining, to hold for twenty years, upon payment of rent. All the justices "(except *Brown* Justice, who did not speak to that point,) agreed that the word *appertaining* to the messuage shall be here taken in the sense of *usually occupied* with the messuage, or lying to the messuage; for when *appertaining* is placed with the said other words, it cannot have its proper signification, and therefore it shall have such signification as was intended between the parties, or else it shall be void, which must not be by any means; for it is commonly used in the sense of *occupied with*, or *lying to*, *ut supra*, and being placed with the said other words, it cannot be taken in any other sense, nor can it have any other meaning than is agreeable with law, and forasmuch as it is commonly used in that sense, it is the office of Judges to take and expound the words which common people use to express their meaning, according to their meaning; and therefore it shall be here taken, not according to the true definition of it, because that does not stand with the

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matter, but in such sense as the party intended it." In *Dyer*'s report of the case, *Stamford* J. is reported to have said, that land may be appurtenant to a messuage, though the other Judges disagreed, but they all thought that the lands passed under the words "*cum omnibus terris eidem messuag. pertinent.*," as well by the intention of the parties as the occupation of the land and messuage together. The same proposition is laid down in *Palmer* 375., where it is said that a joint occupation for five or six years is sufficient for to make reputative appurtenances. In *Cro. Eliz.* 16., *Anderson* J. says, "That land shall pass as pertaining to a house which has been occupied with it by the space of ten or twelve years, for by that time it hath gained the name of parcel or belonging, and shall pass with the house by that name in a will or leases." And if this construction has been adopted by the courts with reference to common law conveyances, it is unquestionable, that in order to further the intentions of the devisor, a more liberal construction may be adopted with reference to wills. Now what was the situation of the lands in question? They were purchased previously to the year 1632, and have been occupied with the rectory ever since. It was admitted by the counsel for the Defendant, that though the twelve acres demised with the rectory in the time of *James* the First could not, strictly speaking, be appurtenant to it, yet, that if they were properly designated, they might pass under the words "thereunto belonging." But if they were not originally appurtenant, they never could become so, and therefore could only pass with the rectory by virtue of a concurrent occupation. The admission, therefore, goes a long way in determining what ought to be the decision of the court with respect to the other lands. In the lease of 1747, all these lands but the *Ferry Marsh*, which is specially excepted, are

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described as belonging to the parsonage. It is true, that in this lease the messuage with the appurtenances called the *Shoulder of Mutton* has a distinct description, but it is immediately followed by general words, which apply to the rectory; "all the glebe lands and tithes of corn, &c. and all compositions." In the lease of 1765, there is the same description of the lands as in the lease of 1804; in this latter, the lands subsequently acquired by *Hopson* are designated by a specific description, and in the will the devisor, knowing that these subsequently-acquired lands had no reputation of occupancy by reason of the recency of the purchase, he again enumerates them under a specific description. The case of *Buck* v. *Nurton* (a), although the decision differs from that which the Court will pronounce upon the present occasion, affords a strong illustration of the principle on which we shall proceed. It was there holden, that lands usually occupied with a house will not pass under a devise of a mansion-house with the appurtenances, unless it clearly appears that the devisor meant to extend the word "appurtenances" beyond its technical sense; it was collected from the object for which the mansion-house was devised to the defendant, that the devisor had in that case no such intention; but *Eyre* C. J. says, "Lands will not pass under the word 'appurtenances' in its strict technical sense; they will pass if it appears that a larger sense was intended to be given to it. If the courts had always adhered to this line of construction, many reported cases would not now disgrace the books." In that case there was a further clue to the sense in which the devisor had employed the word "appurtenances" with regard to the Defendant; namely, that in the case of another devisee, to whom, after a short term to the Defendant, he had devised the mansion-

(a) 1 *B. & P.* 53.

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house and lands usually occupied with it, he had employed the words, "my mansion-house, and the lands and grounds thereto belonging, and therewith held and enjoyed, with the appurtenances;" whereas, with regard to the Defendant he had only said, "my mansion-house with the appurtenances." Now, the present is not a case in which the word "appurtenances" in one part of the will is to be contrasted with appurtenances in another part, but the expression employed is, "the rectory or parsonage, with the messuages and lands, &c. *thereunto belonging*." It is observable too, that this is a devise of messuages, whereas, strictly speaking, there is but one belonging to the rectory. Considering, therefore, that the lands in question have been uniformly occupied together with the parsonage, and that they are contained in the several successive leases of the property; the Court is of opinion, that, under the general words "thereunto belonging," all lands pass which are described in the lease of 1789; and that, therefore, there must be

Judgment for the Plaintiff.

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Devise to *A.* when he should attain twenty-one, for life; and after his decease to the first son of the body of *A.* lawfully begotten, and the heirs male of the body of such first son; like remainders to the second and other sons in succession; like remainder to the daughter or daughters. Like devise to *B.*, brother of *A.*, with like remainders to *B.*'s issue. Like devises to *C.* and *D.*, other brothers of *A.*, with like remainders to their respective issues. And in case either or any of them, (*A.*, *B.*, *C.*, and *D.*,) should die before the age of twenty-one years, or without leaving any child or children of his or their bodies lawfully begotten, then that the several estates devised to him or them should go to the survivor or survivors, share and share alike, under the same limitations as before described.

A. having attained twenty-one, and being a bachelor and unmarried, made a feoffment, and levied a fine with proclamations, of the property devised to him, to his own use in fee, and to the intent to destroy contingent uses and estates limited to his sons and daughters:

Held, that by so doing, he acquired an absolute estate of inheritance in the property.

JOHN HASKER, by his last will, dated 28th *October*, 1780, gave and devised, among other hereditaments, the hereditaments comprised in the agreement hereinafter mentioned unto *William Hasker*, the Plaintiff, second son of his nephew, *Thomas Hasker*, when and so soon as he attained his age of twenty-one years, *for and during the term of his life*, subject as in the will was mentioned, and immediately from and after his decease he gave and devised the same hereditaments *to the first son of the body of the Plaintiff, William Hasker*, lawfully begotten, *and to the heirs male of the body of such first son*, lawfully issuing; and in default of such issue to the use and behoof of the second, third, and every other son of the body of the Plaintiff *William Hasker*, lawfully begotten, and to the heirs male of their respective bodies, lawfully issuing, severally and respectively, and in remainder the one after the other in seniority of age; the elder of such sons, and the heirs male of his body, being always preferred to the younger sons and the heirs male of their bodies; and in default of such issue, to the use and behoof of the daughter or daughters of the Plaintiff

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William Hasker, lawfully begotten, and the heirs male of her or their respective body or bodies; and the testator also gave, devised, and bequeathed the two leasehold messuages therein mentioned unto the Plaintiff *William Hasker*, his executors, administrators, and assigns, when he should attain to his age of twenty-one years; and the testator gave and devised certain other hereditaments, in his will described, to *John Hasker*, eldest son of his nephew, *Thomas Hasker*, when he should attain his age of twenty-one years, for his natural life, subject as therein mentioned; and from and after his decease the testator gave and devised the same to the first and other sons of *John Hasker*, in tail male, and for default of such issue, to the daughter or daughters of *John Hasker*, in tail male, as tenants in common, in the same manner as he gave the first-mentioned hereditaments to the sons and daughters of the Plaintiff, *William Hasker*, after his decease. And the testator gave and bequeathed, subject as before, certain other messuages and premises to *Thomas Hasker*, the third son of his nephew, *Thomas Hasker*, when he should attain his age of twenty-one years, for life, remainders to his sons and daughters, as to the sons and daughters of *William Hasker;* and he also gave and devised, subject as before, certain leasehold hereditaments to *Thomas Hasker*, the third son of his nephew, *T. H.* his executors, administrators, and assigns, when he should attain the age of twenty-one years. And the testator also gave, subject as before, certain other hereditaments unto *Richard Hasker*, fourth son of his nephew, *Thomas Hasker*, when he should attain twenty-one, for life, with remainders to his sons and daughters as in the former cases. And he also gave and bequeathed all his right, title, estate, and interest of, in, and to, a certain mill, with its appurtenances, called *Longbridge Mill*, situate at *Sherfield* on the *Loddon*, then in the occupation

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pation of *George Woodroffe*, to *Richard Hasker*, his executors, administrators, and assigns, when he should attain his age of twenty-one years, for the residue of a certain term of years which he had therein then to come. And it was the testator's express will, desire, and direction, that no timber should be cut from any of the estates devised, until the devisee claiming the same should attain the age of twenty-one years, except for necessary repairs. *And in case either or any of the sons of his nephew,* Thomas Hasker, *should happen to die before he or they should attain the age of twenty-one years,* or *without leaving any child or children of his or their body or bodies, lawfully begotten, then it was the testator's express will and desire, that the several estates devised to him or them should go to the surviving son or sons of his nephew* Thomas Hasker, share and share alike, when and so soon as he or they should attain to his or their respective age or ages of twenty-one years, for his or their natural life or lives, and immediately from and after his or their decease or deceases, to such uses, limitations, and appointments as were thereinbefore limited and appointed of the several estates given and devised to him or them respectively; and the testator, by his will, authorised and empowered his executors, and the survivors and survivor of them, to receive the rents, issues, and profits of each particular estate devised to the sons of his nephew, *Thomas Hasker*, until the devisee entitled to the same should attain his age of twenty-one years, for the purpose of paying and discharging out of the rents, issues, and profits of each particular estate the annuities charged on such estate, and the interest of money then raised, or to be raised, on the security thereof, with other incidental expences that might happen to affect or incumber the same during the minority of the devisee entitled thereto, the residue of such rents, issues, and profits, if any, to re-

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main from time to time in the hands of his executor for the sole benefit of, and to be paid to, such devisee when he should come of age.

The testator left his niece *Dorothy*, the wife of *John Lee*, his heiress at law, and on the death of the testator, the reversion in fee of the hereditaments devised by the testator's will to *John*, *William*, *Thomas*, and *Richard Hasker*, for their respective lives, with remainder to their respective sons and daughters, as before mentioned, descended to her as heiress at law.

Dorothy Lee died in 1797, leaving *Henry Pincke Lee*, her eldest son and heir at law, to whom the reversion descended, he being also the heir at law of the testator.

Previous to *January*, 1817, the Plaintiff, *William Hasker*, attained his age of twenty-one years, and was a bachelor, and had no issue at the date of the feoffment hereinafter mentioned, and the livery made pursuant thereto.

By indenture, bearing date the 1st *January*, 1817, and made between the Plaintiff, *William Hasker*, of the one part, and *William Seymour*, of the other, *William Hasker* demised all the hereditaments and premises which were originally devised to him by the testator, comprising (amongst others) the hereditaments and premises mentioned in the agreement, to hold the same (subject to the encumbrances affecting them) unto *William Seymour*, his executors, administrators, and assigns, for the term of ninety-nine years, if the Plaintiff, *William Hasker*, should so long live, upon trust for the Plaintiff, *William Hasker*, and his assigns.

By an indenture of feoffment, dated the 3d *January*, 1817, and made between the Plaintiff, of the first part, *Henry Pincke Lee*, of the second part, *John Cole*, of the third part, and *Jonathan Hilkiah Bricknell*, of the fourth part, and by livery of seisin made according to that indenture, after reciting to the effect above stated, and that

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that the Plaintiff, *William Hasker*, being desirous of acquiring the fee simple of the hereditaments devised by the will of the testator to him, had applied to *Henry Pincke Lee*, as the heir at law of the testator, to concur with him in a feoffment and fine of the hereditaments unto *Richard Cole* and his heirs, to and for the use of the Plaintiff, *William Hasker*, to the intent to destroy the contingent uses and estates limited to his sons and daughters, of and in the hereditaments devised to him, and all other contingent uses and estates whatsoever thereon respectively expectant or subsequent thereto, and to pass the reversion in fee therein, then vested in *Henry Pincke Lee* as heir at law of the testator to the use aforesaid: It was witnessed, and the Plaintiff did grant and enfeoff, and *Henry Pincke Lee* did grant, enfeoff, and confirm unto *Richard Cole*, his heirs and assigns, the hereditaments comprised in the agreement, to hold unto him, his heirs and assigns for ever, to such uses as the Plaintiff should by any deed or writing direct and appoint; and in default of such direction and appointment, to the use of the Plaintiff, *William Hasker*, and his assigns for life, with remainder to the use of *Richard Cole*, his heirs and assigns, during the life of the Plaintiff and his assigns, upon trust, for the sole benefit of the Plaintiff and his assigns, and to the intent that any wife of the Plaintiff might not be entitled to dower, with remainder to the only proper use of the Plaintiff, his heirs and assigns for ever. The indenture contained a covenant by the Plaintiff and *Henry Pincke Lee*, to levy unto *Richard Cole* and his heirs a fine *sur conuzance de droit come ceo* &c. with proclamations, of the hereditaments, and a declaration that the fine should enure to the several uses, and upon the trust, intent, and purpose in the indenture expressed and contained concerning the same.

A fine

A fine *sur conuzance de droit come ceo* &c. with proclamations, was duly levied in pursuance of this covenant.

The Plaintiff having been advised, that by the above-mentioned means he acquired an estate in fee simple in the hereditaments devised by the will of the testator, contracted with the Defendants for the sale to them of such hereditaments, but they afterwards objected to the title thereto, and the Plaintiff exhibited his bill in the Court of Chancery against them, for the purpose of compelling them to complete their purchase. The Defendants having put in their answer, the cause came on to be heard before his Honor the Vice-Chancellor on the 6th *May*, 1822, when his Honor directed a case to be made for the opinion of this Court upon the following question,

Whether the Plaintiff, under and by virtue of the will of *John Hasker*, and by the indenture of demise of the 1st *January*, 1817, and the indenture of feoffment of the 3d *January*, 1817, and the fine levied in pursuance of the covenant contained in the indenture of the 3d *January*, 1817, acquired an absolute estate of inheritance in fee simple, of and in the said hereditaments, discharged from the remainders and executory devises, if any, limited and created by the will of *John Hasker?*

Pell Serjt for the Plaintiff. If the limitations expectant upon the determination of *William Hasker's* estate were remainders and contingent, they were barred by the fine and feoffment of 1817, and the Plaintiff's title is good. They were remainders according to the general rule, which lays it down, that a limitation shall never be construed as an executory devise, where there is a preceding estate of freehold sufficient to support a remainder, and the estate limited to *William Hasker* for life was clearly of that nature; whether or not they were

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were contingent, will depend upon the construction to be put on the word *or* in the sentence, "*In case either of the sons of* Thomas Hasker *should happen to die before he or they should attain the age of twenty-one years,* or *without leaving any child.*" Now, in a will or surrender, the courts have always construed the *or* in such a sentence conjunctively or disjunctively, or have expunged it altogether, as would best effectuate the intention of the devisor or surrenderer. *Price* v. *Hunt* (*a*), *Soulle* v. *Gerrard* (*b*), *Barker* v. *Suretees* (*c*), *Wright* v. *Kemp* (*d*), *Fairfield* v. *Morgan* (*e*), *Eastman* v. *Baker* (*f*), *Crump* v. *Norwood* (*g*), *Collinson* v. *Wright* (*h*), 1 *Eq. Cas. Abr.* 188. But the intention of the devisor in the present case was most clearly that the *or* should be read conjunctively *and*, or be omitted. For, if *William Hasker* had married and died before twenty-one leaving issue, it never could have been the devisor's intention to leave that issue unprovided for; and yet such might have been the case if the *or* be read disjunctively. To justify the construction which will be contended for on the part of the Defendant, if it is to be argued that the remainders over were vested, the Court must strike out the words, "he should attain the age of twenty-one years," an alteration much more extensive than that which is required by the Plaintiff. *William Hasker* himself took a vested interest, though he was not to come into possession till twenty-one; *Boraston*'s case (*i*); but if *or* be read as *and*, it is impossible to contend that the remainders expectant on the determination of his life were vested, for they fall in every respect within the strict definition of a contingent remainder as given by *Fearne*. *Brownsword* v. *Edwards* (*j*)

(*a*) *Pollexf.* 645.
(*b*) *Cro. Eliz.* 525.
(*c*) 2 *Str.* 1175.
(*d*) 3 *T. R.* 470.
(*e*) 2 *N. R.* 40.
(*f*) 1 *Taunt.* 181.
(*g*) 7 *Taunt.* 363.
(*h*) 1 *Sid.* 148.
(*i*) 3 *Rep.* 19.
(*j*) 2 *Ves. jun.* 243.

and

and *Doe dem. Usher* v. *Jessep*(a) will be relied on by the other side; but *Brownsword* v. *Edwards* is outweighed by the mass of conflicting authority; and in *Doe dem. Usher* v. *Jessep*, it was necessary to construe *or* in its natural sense, to give effect to the obvious intention of the testator.

Bosanquet Serjt., contrà. There is no reason for rejecting the *or*, or for reading it conjunctively. There would be nothing unreasonable in the supposition that the devisor wished to deter *William Hasker* from an early and imprudent marriage. But the ground upon which the Defendants rely is, that the limitation in question was a vested remainder, to take effect after the natural expiration of the preceding estate for life to *William Hasker*, and the estates tail to his children. The testator having four great nephews gives a part of his estate to each for life, with remainder in strict settlement to his children. It is manifest that the surviving great nephews were not to take any thing as long as there was issue of the great nephew deceased; nor was the heir at law to take any thing as long as there was issue of any of the great nephews. The Court, therefore, will not put such a construction upon the terms of the limitation in question, as to defeat any of the preceding estates expressly limited, but will construe them as descriptive of the events in which those estates would fail, and as conveying a remainder after their natural expiration. The circumstance of the devisor having repeatedly used the words "when he shall attain the age of twenty one years," as descriptive of the time when the devisee would be entitled to possession, may easily account for the use of similar words in the limitation over, as describing an event in which the

(a) 12 *East*,

limitation

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limitation to the first taker for life would be likely to fail, though the subsequent words alone would have been sufficient for the purpose. In all the cases upon wills, in which *or* has been construed conjunctively, the first taker has been a devisee in fee, so that the limitations over were necessarily executory devises, displacing the first estate; and unless the construction adopted had prevailed, the heirs of the first taker in fee would have been ousted. [Lord *Gifford* C. J. If the Court construes this *or* disjunctively, they must strike out the whole condition as to the devisee's dying under twenty-one.] The expressions of the devisor may be inaccurate, but the intention is plain; and if this case had occurred before *Price* v. *Hunt*, there could have been no doubt. The case of *Brownsword* v. *Edwards* is expressly in point, where Lord *Hardwicke* not only considered a limitation, such as the present, as a vested remainder, but altered *and* into *or*. The Defendants only seek to retain it. *Wright* v. *Kemp*, the only case in which *or* has been construed conjunctively, when the preceding limitation was not in fee, was the case of a copyhold, to the use of the surrenderor for life, remainder to *W. W.*, an illegitimate son, for life, remainder in tail to the issue of *W. W.*, lawfully begotten; and if *W. W.* should die in *the lifetime* of the surrenderor, *or* without issue, remainder to the *surrenderor* in fee: *W. W.* died, leaving issue, in the lifetime of the surrenderor, so that if the *or* had not been construed coujunctively the surrender would have been absolutely without effect. The words "without child or children" plainly refer to the former limitation in strict settlement, and have been considered in many cases to mean issue generally; and the "and leaving" has been considered as leaving at any time, so as to denote an indefinite failure of issue. *Roe* v. *Scott and Smart.* (*a*)

(*a*) *Fearne*, 473. n.

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The following certificate was afterwards delivered:

This case has been argued before us. We have considered the same, and are of opinion that the Plaintiff, under and by virtue of the said will of the said *John Hasker*, the said indenture of demise of the 1st *January*, 1817, the said indenture of feoffment of the 3d *January*, 1817, and the said fine levied in pursuance of the covenant contained in the said last mentioned indenture, acquired an absolute estate of inheritance in fee simple of and in the hereditaments, discharged from the remainders limited and created by the will of the said testator *John Hasker*.

It was not contended before us that the said will contained any executory devise or devises affecting the said hereditaments.

GIFFORD.
J. A. PARK.
J. BURROUGH.

END OF HILARY TERM.

AN

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TO THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

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 sued

sued against the other four, who were not named in the bailable process; the declaration was against all five; the Court permitted the Plaintiff to amend the bail recognizance by inserting the names of the four Defendants who had been at first omitted. *Christie* v. *Walker and Four Others.* *Page* 206

ANNUITY.

1. By 53 *G.* 3. *c.* 141. it is enacted, that within thirty days after the execution of every deed, &c. whereby any annuity or rent-charge shall, from and after the passing of the said act, be granted for life or lives, or for any term of years, or greater estate determinable on life or lives, a memorial of the date of every such deed, &c. of the names of all the parties and and all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, shall be inrolled in Chancery in the form or to the effect therein exemplified, with such alterations as the nature and circumstances of any particular case may reasonably require; and in a schedule, the following directions are given as to the mode of describing the witnesses in the memorial: at the head of one of several columns, which are to contain the substance of the deeds, stand the words, "names of witnesses;" and underneath, as applicable to indentures of lease and release, the letters and words, "*E. F.* of ——, *G. H.* of ——;" and, as applicable to a bond and warrant of attorney to confess judgment, the letters, "*E. F.*, *G. H.*" Where the witnesses to the deeds were attorneys' clerks: Held, that they were sufficiently described in the memorial as clerks to *E. H.* (their employer) of *B.* (the employer's residence). *St. John* v. *Champneys.* *Page* 77
2. An annuity being in arrear, and the rents of an estate on which it was secured being unpaid, the trustee of the estate, who had negociated the annuity between the grantor and grantee, having advanced a sum to the grantee in anticipation of the coming rents, and having received from the grantee on this advance the commission which he usually received on annuity payments, the Court set aside an execution which (the rents proving insufficient) was afterwards issued for this sum in the name of the grantee, against one who, as surety for the payment of the annuity, had given a warrant to confess judgment. *Williamson* v. *Sir George Goold.* 171
3. An annuity being in arrear, and the rents of an estate on which it was secured being unpaid, the receiver of the rents, who had negociated the annuity between the grantor and grantee, having advanced a sum to the grantee in anti-

anticipation of the coming rents, and having received from the grantee on this advance the commission which he usually received on annuity payments, the Court set aside an execution, which (the rents proving insufficient,) the grantee afterwards issued for this sum against the grantor. *Carroll* v. *Sir George Goold.* *Page* 191

4. Where, upon the grant of an annuity, the agent of the grantee, on paying the consideration money, retained, or caused to be returned to him, a considerable sum for the expence of deeds, investigating title, journeys, &c., (two witnesses, brought from a considerable distance for the purpose of attesting the annuity deed, having first retired,) the Court held this an illegal retainer, for which the grantee was responsible, and on that ground set aside the annuity ten years after it had been granted and acted on, though the grantee alleged that he had given no authority for, and was ignorant of, such retainer. *Williamson* v. *Henry Michael Goold.* 234

5. Where the surety under an annuity deed obtained an order to set aside an execution under which he was in custody for arrears of the annuity, upon entering into an account and paying the balance which should be found due under the provisions of the deed, and the principal afterwards succeeded in setting aside the deed itself, the Court refused to discharge the surety until he had entered into an account, or paid money into court to cover what might ultimately be found due. *Williamson* v. *Sir George Goold.* *Page* 274

6. A person employed by the grantor of an annuity to raise money, and by the grantee to pay the consideration money to the grantor, having at the time of the payment of the money received back some part of it for a debt alleged to be due from the grantor to himself, the Court, on motion, set aside the annuity on the grantor's paying principal and interest at 5 *per cent.,* though the grantee never received any of the money so returned, and was ignorant of that part of the transaction. *Gorton* v. *Champneys,* and *Coventry* v. *Champneys.* 287

7. Where an annuity was set aside upon the grantor's paying what should be found due for principal and interest at 5 *per cent.*, the Court allowed the grantee his fair disbursements for the conveyances by which the grant of annuity was effected and secured. *Williamson* v. *Goold.* 316

APOTHECARY.

In an action to recover the amount of an apothecary's bill, the Plaintiff who, under 55 *G.* 3. *c.* 194., proves a certificate from the Society of Apothecaries, need not also prove an apprenticeship served. *Sherwin* v. *Smith.* 204

APPRENTICE-DEED.

See EVIDENCE, 8.

APPROPRIATION.

A. had, for the purpose of sale, consigned a cargo of fish to *B.*, who was in correspondence and connected with the house of *C.* *C.* had advanced money to *A.*, on an engagement from *A.* that the proceeds of the cargo of fish should be remitted by *B.* to *A.* through the hands of *C.*, in order that they might so constitute a security for the money advanced by *C.* *A.* then wrote to *B.*, telling him that the cargo of fish was *not* responsible for any advances made by *C.* Notwithstanding this *B.*, after the receipt of *A.*'s letter, remitted the proceeds to *C.*, who retained them to cover his advance. *A.* having become bankrupt, and his assignees having sued *B.* for these proceeds:

Held, that a jury was warranted in considering *A.*'s engagement as an appropriation of the cargo of fish, which he could not rescind, and not a mere order for payment of money, which could be revoked by a subsequent countermand before payment. *Fisher and Another, Assignees,* v. *Miller.* *Page* 150

ARBITRATION.

1. Where a cause was referred to arbitration under a judge's order, and one of the parties, before the award was published, and before the judge's order was made a rule of court, revoked his submission. The arbitrator having made an award notwithstanding this revocation, the Court set aside the award, although the judge's order had been made a rule of court before any application to set aside the award. *Clapham* v. *Higham.* *Page* 87

2. Even where matter of law alone, and no matter of fact is referred to a barrister, the Court will not set aside an award made by him, on the ground that it is contrary to law, unless the illegality appear on the face of the award. *Cramp* v. *Symons.* 104

3. A Defendant having, at the trial of an action on the case, agreed to enter into a rule of *nisi prius*, to repair and reinstate premises which he had wrongfully damaged, it was referred to a barrister to settle what sum should be paid in lieu of his doing this. The Defendant's attorney produced no witnesses at the first meeting, under the arbitration, of which he had had ample notice, but the Plaintiff's witnesses gave in their estimate, and the arbitrator, after viewing the premises, appointed a day for a second meeting. The Defendant's attorney called before that day, and said that his witnesses (two surveyors, who had known the premises before the action,) could not attend; the arbitrator, although one of these witnesses

witnesses might have attended the first meeting, appointed a third meeting for the evening before he was about to leave *London* for the circuit: on the morning of that day, Defendant's attorney called on the arbitrator, and left an affidavit, stating that one of the two surveyors was confined to his bed, and the other gone to *France*. The arbitrator suggested that other surveyors were equally capable of making an estimate for the Defendant, and offered, if the Defendant's attorney would name a day, to come to *London* to hear them, or the two first proposed; the attorney refused to name a day, or to procure other surveyors, though another surveyor and a carpenter had attended the trial of the cause on Defendant's behalf. The arbitrator then gave the Defendant's attorney notice he should make his award, if required by the Plaintiff; and being required, awarded a sum to be paid to the Plaintiff.

The Defendant's attorney swearing he understood the arbitrator meant to have called another meeting, the Court set aside the award, though no objection was made to the amount awarded; leaving, however, the Plaintiff at liberty to enforce the Defendant's agreement to enter into the rule of *nisi prius* for the reinstating the premises. *Dodington* v. *Hudson*. *Page* 384

ARREST.

Where a sheriff's officer, who had forborne to arrest a Defendant upon his promising to put in good bail, afterwards, on hearing that such bail would not be forthcoming, himself put in bail without the consent of the Defendant, and then, accompanied by the bail so put in, took the Defendant into custody the day before the Defendant's time for putting in bail expired, the Court discharged the Defendant, and made the sheriff's officer pay costs. *Taylor* v. *Evans*. *Page* 367

ARREST OF JUDGMENT.

See Evidence,

ASSIGNEE.

See Insolvent Debtor, 2.

ATTACHMENT.

See Practice, 20. and 24.

The Court will grant an attachment against a party for non-performance of an award which has been made a rule of court, though he reside out of the jurisdiction of the court. *Hopcraft* v. *Fermor*. 378

ATTORNEY.

See Costs, 1.

1. An attorney cannot recover a charge for conducting a suit in which the party charged has not had the benefit of the attorney's

judgment and superintendence. Therefore, where, in an action on an attorney's bill, it appeared that the Plaintiff lived at *D.*, five miles from *W.*, that the Defendant lived at *H.*, fourteen miles from *W.*, and applied to *J. B.* (who resided at *W.*, and who had been a clerk of the Plaintiff, and practised in his name), to carry on the suit for which the bill in question was incurred; *J. B.* carried on the suit, and it did not appear that the Defendant ever saw the Plaintiff, or had the benefit of his judgment; the business done at the office at *W.* was for *J. B.*'s benefit, except one-third, which the Plaintiff received for coming over once a week to shew his face; Plaintiff's name was not on the door at *W.*, nor was it employed by *J. B.* in soliciting business; but *J. B.* frequently consulted with Plaintiff; drafts were sometimes engrossed at *D.* for the office at *W.*; the draft of the brief which *J. B.* had carried on for Defendant was in the hand-writing of Plaintiff, as well as some items in *J. B.*'s books touching that suit; the Defendant, when applied to, admitted the sum claimed, but required to set off a sum due to him from *J. B.*, which was refused:

Held, that a nonsuit, directed by the Judge who tried the case, was proper. *Hopkinson* v. *Smith.* *Page* 13

2. An attorney who has ceased to practice may be re-admitted without paying arrears of duty. *Ex parte Cunningham.* *Page* 91

3. The Court granted a rule *nisi* calling upon an attorney to answer for alleged misconduct, in a matter where no suit was depending, but which appeared to have been entrusted to him in the capacity of an attorney. *In the Matter of Knight.* 91

4. The Court will not call upon an attorney summarily to answer the matters of an affidavit charging him with an indictable offence, but will leave the parties complaining to their prosecution for the offence. *Short* v. *Pratt.* 102

5. The Court will not proceed summarily against an attorney on an affidavit charging him with an indictable offence. *In the Matter of Knight and Hall.* 142

6. The Court refused to strike an attorney off the rolls on the ground that he had not served a regular clerkship, and had misconducted himself previously to admission. *In the Matter of Page.* 160

BAIL.

1. The principal offered to surrender on the 13th of *May*, but the Plaintiff gave him time, and dispensed with the surrender, on an understanding that the bail should continue liable. On the 11th *June* the bail, ignorant that the Defendant

fendants' commissioners under the first commission for an alleged wrongful imprisonment; they entered up judgment of nonsuit against him in *July*, and afterwards charged him in execution for costs: Held, that the Defendants might have proved their debt under the second commission, and that Plaintiff was entitled to be discharged from it under his certificate. *Holding* v. *Impey and Others.* *Page* 189

3. A bankrupt having promised, after his bankruptcy, and before certificate, to pay a debt due before the bankruptcy, indorsed to the Plaintiff two promissory notes for that purpose: Held, that his cerficate was no bar to an action on these notes. *Brix* v. *Braham*, 281

4. Bankruptcy and certificate are no discharge to a bond given under 4 *G*. 3. *c*. 33. by a trading member of parliament, where the judgment in the suit in which the bond was given is obtained after the bankruptcy, though before certificate. *Campbell* v. *Jameson and Another.* 320

5. A surety under an annuity deed, who has redeemed the annuity subsequently to the bankruptcy and certificate of the grantor, may maintain an action against the grantor for the sum paid on account of redemption, although the grantee may have proved the value of the annuity under 49 *G*. 3. *c*. 121. *s*. 17. *Watkins* v. *Flanagan* 413

BARON AND FEME.

See Evidence, 6.

In an action against a feme covert, the Court would not, upon a summary application, cancel the bail-bond, and permit Defendant to file a common appearance, where much of the debt sued for was contracted before the Defendant disclosed her coverture, where she acted with great duplicity in eluding payment, and, at the time of the application, was residing out of the jurisdiction of the court. *Luden* v. *Justice.* *Page* 344

BOND.

A bond by which, after reciting the partnership of *J. C.* and *T. C.*, *W. P.* became surety for such sums as should be advanced to meet bills drawn by *J. C.* and *T. C.*, or either of them, was held not to extend to bills drawn by *J. C.* after the death of *T. C.* *Simson* v. *John Cooke and Others.* 452

CERTIFICATE.

See Bankrupt, 5.

CLERK OF PAPERS.

The clerk of the papers in the *Fleet* prison is entitled to a fee of 2*s*. 6*d*. on every action from which a prisoner

The cause having been referred back to the arbitrator, he certified in the same way a second time, but omitted to give any direction as to the costs of the second reference: Held, that the Plaintiff was entitled to those costs. *Mackintosh* v. *Blyth*. *Page* 269

10. Where the costs in the cause are adjudged to the Defendant, and to the Plaintiff costs on the issues found for him, the costs of the issues, except in replevin, include only the costs of pleadings. *Othir* v. *Calvert*. 275

COUNTY COURT.

In trover, the Court would not stay proceedings on an affidavit from the Defendant that the cause of action did not amount to 40*s*. *Lowe* v. *Lowe*. 270

COVENANT.

By indenture between *S. F.*, senior, of the first part, *S. F.*, junior, of the second part, and *J. H. H.* on the third part, it was agreed that *S. F.*, senior, should retire from business, and *S. F.*, junior, and *J. H. H.* become partners; that the capital employed should be 36,000*l.*, 24,000*l.* of which *S. F.*, senior, should advance for *S. F.*, junior, and 12,000*l.* was to be advanced by *J. H. H.* The deed then proceeded, "And whereas an account of all the debts of *S. F.*, senior, in his business of merchant, has been this day taken, and the balance in his favour amounts to 38,033*l.*, *and whereas it has been agreed by and between* S. F., *senior*, S. F., *junior*, *and* J. H. H.; *that the whole of the debts and credits of* S. F., *senior*, *shall be received and paid by* S. F., *junior*, *and* J. H. H., and that the balance of 38,033*l.* shall be accounted for and paid by them in manner hereinafter mentioned; and *S. F.*, senior, by indenture, hath assigned the debts and credits to them, this indenture further witnesseth that it is agreed, that in consideration of 12,000*l.* paid to *S. F.*, senior, by *J. H. H.*, and for raising 24,000*l.*, as *S. F.*, junior's share of the capital, the sum of 36,000*l.*, part of the 38,033*l.*, is to be retained by *S. F.*, junior, and *J. H. H.*, and the remaining 2033*l.* paid to *S. F.*, senior, by instalments, at six, twelve, and eighteen months; and if any of the debts shall prove bad, the loss shall be borne by *S. F.*, junior, and *J. H. H.*:" Held, that this deed amounted to a covenant by *S. F.*, junior, and *J. H. H.* to pay the debts due from *S. F.*, senior, in his business, at the date of the indenture. *Saltoun and Others, Executrix and Executors*, v. *Houston and Others, Executrix and Executors*. *Page* 433

DEED, CONSTRUCTION OF.

A. and *B.*, by a deed, (reciting that *C.* had left them considerable pro-

perty

perty in strict settlement, with remainder over, on failure of issue male of *A.* and *B.*, to *D.*, a lieutenant of marines, but had made no other provision for *D.*,) agreed with *D.*, his executors and administrators, to pay him an annuity for twenty-one years, if *A.* and *B.*, or the survivor of them, shonld so long live; and in case *D.* should die within the term, to his child or children, if any, in such proportions as *D.* should appoint, or in default of appointment, to all of them equally; and if there should be no child, to his wife, if she should remain a widow.

D. covenanted that, if he or his children should come into the property left by *C.*, they would refund all that might have been received under the annuity.

D. having died within the term, and also his only child and wife:

Held, that *D.*'s administrator was not entitled to claim payment of the annuity after their deaths. *Barford* v. *Stuckey*. *Page* 225

DEVISE.

. Under a devise of the rectory or parsonage of *M.*, with the messuages, lands, &c. *thereunto bebelonging:* Held, that lands passed which had been acquired by the owners of the rectory between the fifth year of *James* the First and 1632, and had always afterwards been occupied with the rectory. *Ongley* v. *Chambers*. 483

2. Devise to *A.* when he should attain twenty-one, for life; and after his decease to the first son of the body of *A.* lawfully begotten, and the heirs male of the body of such first son; like remainders to the second and other sons in succession; like remainder to the daughter or daughters. Like devise to *B.*, brother of *A.*, with like remainders to *B.*'s issue. Like devises to *C.* and *D.*, other brothers of *A.*, with like remainders to their respective issues. And in case either or any of them, (*A.*, *B.*, *C.*, and *D.*,) should die before the age of twenty-one years, or without leaving any child or children of his or their bodies lawfully begotten, then that the several estates devised to him or them should go to the survivor or survivors, share and share alike, under the same limitations as before described.

A. having attained twenty-one, and being a bachelor and unmarried, made a feoffment, and levied a fine with proclamations, of the property devised to him, to his own use in fee, and to the intent to destrey contingent uses and estates limited to his sons and daughters:

Held, that by so doing, he acquired an absolute estate of inheritance in the property. *Hasker Clerk* v. *The Right Honourable Charles Manners Sutton and Others*. *Page* 501

DIS-

DISCHARGE AND SATISFACTION.

1. The Defendant being indebted to the Plaintiffs on a bill of exchange, renewed the bill when it became due, by giving another at a longer date, together with a warrant of attorney, to confess judgment in case the second bill should not be paid when it became due, and agreed to pay the expences of the warrant of attorney which was drawn up by the Plaintiff's solicitor; the first bill was not given up, but the Plaintiffs retained it in possession. The second bill was paid when it became due, but not the expences of the warrant of attorney, amounting to 2*l.* 12*s.* 6*d.*, whereupon the Plaintiffs sued the Defendants in assumpsit, and declared on the first bill, adding the common money counts, and a count on an account stated. The jury found a verdict for the Plaintiffs for 2*l.* 12*s.* 6*d.*, without specifying on what counts it should be entered up.

   The Court, with a view to a suggestion to deprive the Plaintiffs of costs, allowed the verdict to be entered on the money counts, holding that the Plaintiffs had no right to sue on the first bill. *Dillon* v. *Rimmer.* Page 100

2. The Defendant, who had ordered goods for ready money, paid for them by returning to the vendor's agent a bill accepted by vendor, which had been due and dishonored before the goods were ordered; the agent at first refused to take the bill, but ultimately carried it home to the vendor, who kept it.

   The vendor having become bankrupt, the Court, in an action brought by his assignees to recover the value of the goods, held this transaction equivalent to payment, no fraud having been established. *Mayer and Another, Assignees of Davison, a Bankrupt,* v. *Nias.* Page 311

DISTRESS.

See PLEADING.

Goods landed at a wharf, and deposited, by a factor to whom they were consigned, in a warehouse on the wharf till an opportunity for sale should present itself, are not distrainable for rent due in respect of the wharf and warehouse. *Thompson* v. *Mashiter* 283

ERROR.

See PRACTICE, 1.

Bill against *James May* the elder, *William James Norton*, and *James May* the younger. On the *postea* it was alleged that "the jury say that *James May* the elder, *William Norton*, and *James May* the younger, did undertake, as the Plaintiff

Plaintiff hath above complained against them." Judgment, "that the Plaintiff do recover against the *said Defendants:*"

Held, that the omission of the name *James* in entering on the *postea* the finding of the jury, was no ground of error. *May and Others* v. *Pigè*. *Page* 314

EVIDENCE.

See PLEADING, 4, 5, 6.

1. The prisoner forged the name of *J. C.* to a power of attorney for selling stock which was standing in the joint names of the prisoner and *J. C.*: The forgery having been discovered, the stock was not sold: Held, that *J. C.* was a competent witness to prove the forgery. *The King* v. *Wait*. 121
2. Where the wife served in her husband's shop, and carried on the business of it in his absence: Held, that admissions made by her on application to pay for goods before delivered at the shop, were receivable in evidence against her husband. *Clifford* v. *Burton*. 199
3. Held, upon motion for a new trial, that in an action by *A.* against *B.* for taking goods which *A.* claimed by assignment from the sheriff under an execution at the suit of *A.* against *C.*'s effects, *A.* must prove the judgment against *C.* as well as the writ of execution, unless it appears upon the record or judge's report that *B.* is the assignee of *C.* *Glasier* v. *Eve and Others*. 209
4. In *replevin* by an under-tenant against a landlord who, towards discharging the rent due from his tenant, distrained, as bailiff, of his tenant for the amount of rent due from the under-tenant to the tenant:

   Held, that the tenant was not a competent witness to prove the amount of the rent due from the under-tenant. *Upton* v. *Curtis and Another*. *Page* 210
5. In an action on the case by a reversioner for an injury done to his inheritance by a stranger, the tenant in possession is a competent witness to prove the injury. *Doddington* v. *Hudson*. 257
6. Where, in an action by a trustee (under a separation agreement) against a husband for the arrears of a weekly sum he had agreed to allow his wife, the declarations of the wife were received in evidence to shew that during the time in respect of which the demand was made she was living in adultery, and the jury found for the Defendant, the Court granted a new trial. *Scholey* v. *Goodman*. 349
7. Declaration, the Plaintiff had employed Defendants to conduct an action of ejectment for the recovery of premises forfeited to the Plaintiff by the tenant's neglect of his covenant to repair; that when the cause came on for trial, it was referred to an arbitrator, who was to decide what repairs should be done, the costs of the action to abide the event; that the arbitrator was ready to proceed, but Defendants neglected to attend him,

him, whereby Plaintiff was obliged to pay Defendants' 60*l.* for his costs incurred in the action of ejectment, which otherwise the tenant would have been obliged to pay, and sold the premises for much less, to wit, 100*l.* less than he would otherwise have done. Verdict for Plaintiff, damages 160*l.*

Held, on motion for a new trial, — 1. That it was not necessary in the action against Defendants to produce the lease on which the ejectment was brought. 2. That the jury were not confined to 100*l.* as the damages for loss on the sale of the premises; and 3. That the declaration was not bad in arrest of judgment. *Swannell* v. *Ellis and Another.* *Page* 347

8. In order to give an indenture of apprenticeship in evidence, it is not necessary under 8 *Ann. c.* 9. to call on the party at the time of giving it in evidence, to make oath as to the amount of premium actually paid. *John and Thomas Stewart* v. *Lawton.* 374

9. The depositions taken upon a commission of bankrupt are not conclusive evidence under 49 *G.* 3. *c.* 121. of a petitioning creditor's debt. *Cooper, Assignee,* v. *Machin and Another.* 426

10. The avowants proved an attornment made by the Plaintiff after ejectment brought against him seven years before the commencement of the replevin suit, during which seven years it did not appear that rent had been demanded.

The Plaintiff offered to prove a feoffment to himself by the person under whom the avowants claimed, and certain letters from that person, containing expressions adverse to the avowant's claim; which evidence having been rejected, on the ground that the Plaintiff could not be permitted to dispute his tenancy after an attornment: the Court granted a new trial. *Gravenor* v. *Woodhouse and Thomas and Wife.* *Page* 38

11. In trover, for a deed which the Defendant had, by letter, admitted he detained at the request of *W. R.* and in the detainer of which *W. R.* was substantially interested. Held, that declarations of *W. R.* in favour of the Plaintiff's claim were properly received in evidence, and that *W. R.* was properly rejected. *Harrison* v. *Vallance.* 45

EXECUTION.

1. Where a Plaintiff withdrew his execution under a consent from the Defendant, that there should be a fresh levy if the debt were not paid within a given time, and the Defendant's goods having been seized under an execution at the suit of another Plaintiff, the first Plaintiff placed his warrant in the hands of the second Plaintiff's officer, who, the Defendant having become a bankrupt, left in the possession of his assignees all the effects remaining after satisfying the second Plaintiff's execution, to the exclusion of the first Plaintiff: the Court, though the effects were

were sufficient to satisfy both executions, would not compel the sheriff to return the first Plaintiff's writ, till he should have been indemnified, and the prothonotary should have decided which of the parties should indemnify him. *Burr* v. *Freethy*. *Page* 71

2. Where a *fieri facias* is sued out after a *scire facias* on a judgment, the *fieri facias* must be grounded on the judgment in the *scire facias*, though the *scire facias* was sued out unnecessarily. *Davis* v. *Norton*. 133

EXECUTOR.

See Deed. Costs, 7.

A., by will, directed his real and personal estate to be sold, the produce to be invested in the public funds, in the names of trustees, for his son and daughter and two others. Directions were given as to succession in cases of death without issue; and if all the legatees should die under age and without issue, the property was to go over to *B*., *C*., *D*., and *E*., and their heirs, "which four persons *A*. appointed as his executors, to see that every thing was duly performed according to his will;" he also appointed *F*. and *G*. as executors, "in addition to the above four persons, for which he requested those two friends would accept of 50*l*. each;" he also requested *F*. and *G*. to act as guardians, in conjunction with *B*., *C*., *D*., and *E*., for the care of the persons and property of the legatees. The will was duly attested, but there was an unattested codicil, that if either of the executors should refuse to accept the trust and act as executor, the bequest of property to every such person was totally annulled.

The testator died, and the will was proved by *B*., *C*., and *D*. only, *E*., *F*., and *G*. having renounced.

Part of the real estate having been put up to sale in four lots, was purchased by *G*., who afterwards refusing to complete his purchase, a suit was instituted in Chancery. That court decreed that the codicil was not to be considered as part of the will, with reference to the real estate, but that the rest of the will ought to be established and the trusts performed; and upon reference to the Master, it was found that the contract of purchase entered into by *G*. was for the benefit of the legatees (who were infants.)

Lot 1. was then conveyed by lease and appointment and release from *B*., *C*., *D*., *E*., *F*., and *G*. to *T*., in consideration of 2000*l*. Lot 2. By lease and appointment and release from *B*., *C*. and *D*. to *T*. for 2300*l*. (*T*. declaring by another deed that the consideration-money mentioned in the two first deeds belonged to *G*., that the name was only used as a trustee, and that *T*. stood seised of the premises in trust for *G*.) Lot 3. by lease and appointment and release from *B*., *C*., and *D*. to *G*., to the use of *G*. for 4000*l*. Lot 4. by lease and ap-

pointment

discharged out of custody at the suit of any Plaintiff, by reason of such Plaintiff forbearing to proceed against him, according to the rules and practice of this court, from the time of such prisoner giving notice of his intention to apply for his discharge, under any act made for the relief of insolvent debtors, until some rule or order shall be made in the cause in that behalf by this Court, or one of the judges thereof. *Regula Generalis.* *Page* 120

2. An officer of the Court, who is appointed provisional assignee under the Insolvent Debtors' Act, must, by the assignment made to him, be taken to accept the property within the meaning of the eighteenth section of that act. *Crofts* v. *Pick.* 354

3. Where Defendant, after verdict applied for his discharge under the Insolvent Debtors' Act, and was sentenced to eighteen months' imprisonment: Held, that though no further proceedings had been taken, the death of the Plaintiff did not entitle the Defendant to be discharged at his suit. *Holmes, Administrator,* v. *Murcott.* 431

INSURANCE.

See LICENCE.

1. The general principle of insurance, that the insured shall, in case of a loss, recover no more than an indemnity, may be controlled by a mercantile usage, clearly established, to the contrary, and usage that the loss in an open policy on freight shall be adjusted on the gross, and not on the net amount of the freight, is a legal usage. *Dallas* C. J. *dubitante.* *Palmer* v. *Blackburn.* *Page* 61

2. Where a ship was so shattered in a storm that upon survey it was found the expence of repairing her would far exceed her original value, and the captain having sold her *bonâ fide* for the benefit of all concerned, the purchaser shortly afterwards broke her up: Held, that this was such an urgent necessity as justified the sale. *Robertson* v. *Clarke.* 445

3. The *Mauritius* is not in the *East Indies,* nor an *Indian* island. *Ibid.*

INTEREST.

See JUDGMENT, 2.

INTERROGATORY.

See PRACTICE, 16.

JOINDER OF PARTIES.

Twenty parishioners joined at a vestry in signing an order authorising two churchwardens to put a new roof on the parish tower; the two churchwardens concurred in giving orders for that purpose, and one of them, the Plaintiff, paid the artificers: a rate for reimbursing them having been quashed, the Plaintiff sued the other churchwarden for a moiety of the money so paid: Held, on motion for a new trial, that the Defendant could

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directed to consider whether the plaintiff's exhibitions were not illegal, as tending to form prize-fighters, the judge declaring such to be his opinion, but recommending the jury to find a verdict for the Plaintiff, in order that the question might be fully discussed, on a motion to set aside such verdict: a verdict having been found for the Defendant, the Court refused to grant a new trial. *Hunt* v. *Bell.* *Page* 1

2. *Semble*, that public exhibitions of sparring matches are illegal. *Ibid.*

3. A party who pursues an illegal vocation has no remedy by action for a libel regarding his conduct in such vocation. *Ibid.*

LICENCE.

A misdescription of the person to whom a licence from the crown is granted to trade with the enemy, does not invalidate the licence. *Lemcke* v. *Vaughan.* 173

LIEN.

See BANKRUPT, 1.

Held, that where the Plaintiff's attorney was indebted to the Plaintiff in a sum greater than the attorney's costs in the cause, the agent (to whom the Plaintiff's attorney was indebted on a general account in a sum greater than the amount of the attorney's costs) could not, as against the Plaintiff, retain out of the sum recovered by the Plaintiff more than the charge for agency in that particular cause. *White* v. *Royal Exchange Assurance.* *Page* 20

LIMITATION OF ACTION.

See STATUTE OF LIMITATIONS.

An officer in the preventive service boarded a ship on the 23d of *August*, and left three armed men on board, but did not then determine on detaining her as a seizure: on the 25th he decided on seizing her, and detained her till the 24th of *September*. The owner having sued him for this seizure and detention: Held, that the time within which the action should have been commenced under 28 *G.* 3. *c.* 37. (three months after the matter or thing *done*,) must be computed from the 23d of *August*. *Crook* v. *M'Tavish.* 167

LIQUIDATED DAMAGES.

The Defendant agreed to take an assignment of Plaintiff's house and premises, without requiring lessor's title; that he would pay 2300*l.* for it, and also the amount of goods, fixtures, and effects, and take possession of the house on or before *September* 29th; the Plaintiff agreed to give up possession of the premises, effects, and stock by that day, to assign licences, to repair or allow for all damaged outside windows, and to clear rent, taxes, and outgoings to the day of quitting possession. The expences of the agreement were to be paid

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by the parties in equal moities; and either party not fulfilling all and every part, was to pay to the other 500*l.*, thereby *settled and fixed as liquidated damages:*

Held, that on breach of the agreement by omission to take an assignment, the Defendant was liable to pay the whole 500*l.*; and that it was not a mere penalty to cover such damages as might be actually incurred. *Reilly* v. *Jones.* *Page* 302

MEMORANDA.

See Pages 337 and 397.

MONTH, HOW CONSTRUED IN ACT OF PARLIAMENT.

Under the 28 *G.* 3. *c.* 37. which limits the commencing of actions against officers of the customs to *three months* after the matter or thing done; but enacts that the officer shall have a *calendar* month's notice of action, and a *calendar* month in which to tender amends: Held, that actions against such officers must be commenced within three *lunar* months after the matter or thing done. *Crooke* v. *M'Tavish.* *Page* 307

NEW ASSIGNMENT.

See Pleading, 11.

NEW TRIAL.

1. On affidavit from a material witness that he had made a mistake in giving his testimony, the court granted a new trial. *Richardson* v. *Fisher.* *Page* 145
2. Where an action for a nuisance was defended by the Defendant's landlord, and the Defendant being told he need not attend the trial, the attorney employed by the landlord entered into a consent rule to abate the nuisance without the consent, and against the directions of the Defendant; the Court, upon strong affidavits to shew that the grievance complained of was no nuisance, set aside an attachment which had issued on the consent rule, and granted a new trial. *Bodington* v. *Harris.* 187
3. In an action against an insurance company to recover a loss by fire, the defence being that the Plaintiff himself had wilfully set fire to the premises, the Judge directed the jury, that in order to their finding a verdict against the Plaintiff, they ought to be satisfied that the crime imputed to him was as fully proved as would justify them in finding him guilty on a criminal charge for the same offence: Held, that this direction was right. *Thomas Thurtell* v. *Beaumont.* 339
4. In the same cause the Court refused to grant a rule *nisi* for a new trial, on the ground that subsequently to a verdict for the Plaintiff, the grand jury had found a bill against him and others for a con-

conspiracy to defraud the insurance company in this very matter. *Thomas Thurtell* v *Beaumont*. *Page* 339

5. But on affidavits disclosing the conspiracy itself, and shewing that the Defendant did not attain a knowledge of it till after the trial, so that the Plaintiff's case was in effect a surprise on him, the Court granted a rule *nisi* for a new trial, on payment of costs, *Ibid.*

NOTICE TO QUIT.

Held, that the visitors and feoffees of a school, who had dismissed the schoolmaster for misconduct, could not maintain ejectment for the schoolhouse till they had determined the master's interest in a regular way, by summoning him to appear before them. *Doe on the demise of Earl Thanet* v. *Gartham, clerk.* 357

PAYING INTO COURT.

Defendant on being arrested placed in the officer's hands, in lieu of bail, a quantity of linen drapery goods; eight days after the process was returnable, the Defendant surrendered himself to prison; and ten days after the process was returnable, the officer who arrested the Defendant paid into the hands of the prothonotaries 30*l.* for the debt in the cause, and 10*l.* for the costs, those being sums which the Defendant was supposed on his arrest to have deposited with the officer in lieu of bail, under 43 *G.* 3. *c.* 46. The Defendant was afterwards, notwithstanding resistance on the part of the Plaintiff, allowed to take this money out of court, on the ground that it had been paid in by mistake. *Hill* v. *Chinn.* *Page* 103

PEREMPTORY UNDERTAKING.

See PRACTICE, 9.

PERJURY.

See BAIL, 3.

PETTY OFFICER.

In *January*, 1811, Plaintiff then serving on board a single king's ship, on a foreign station, was appointed by the captain, boatswain of that ship, and continued so on the 15th *October*, 1815, when the Plaintiff assigned to the Defendant prize-money which the Plaintiff was entitled to receive when due. The warrant of the navy board confirming Plaintiff as boatswain was not signed till the 25th *October*, 1815. Held, that Plaintiff was not within the operation of the acts which render void assignments of prize-money by petty officers and seamen.

An acknowledgment of the correctness of an account, does not

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require a receipt stamp. *Wellard* v. *Moss.* *Page* 134

PLEADING.

See Evidence, 7. and Practice, 20.

1. The condition of a replevin bond was, that Defendant should prosecute with effect his action against Plaintiff for taking and unjustly detaining the goods and chattels of the Defendant in the dwelling-house, farm-lands, and premises of the Defendant, viz. in the parlour a carpet, &c., growing crops of corn in a field called *S.*, &c., and should make return thereof, if return should be adjudged; and should indemnify the sheriff and his officers for replevying the said goods and chattels.

   The declaration stated the condition to be, that Defendant should prosecute with effect his action against the Plaintiff for taking and unjustly detaining Defendant's goods and chattels, in the said condition mentioned, and should make return thereof, if return should be adjudged, and should indemnify the sheriff and his officers for replevying the said goods and chattels: Held, that this was no variance. *Glover* v. *Coles.* 6

2. Covenant by *A.*, on dissolution of partnership with *B.*, to leave 150*l.* in banker's hands till *March*, 1822, as a security towards payment of any demands which might be made on *A.* in respect of debts contracted by *B.* on account of the credit of the partnership; the sum, after *March* 1822, subject to such claims as might have been made as aforesaid, to be paid over to *B.* Breach, that though *B.* had contracted no such debts as aforesaid, and though no claim had been made, *A.* prevented the banker from paying the said sum over to *B.*, after *March* 1822. Plea, that a claim or demand was made on *A.*, in respect of a debt of 200*l.* by one *T. H. as being* a debt contracted by *B.* on account of the credit of the said partnership: Held, ill. *Want* v. *Reece.* *Page* 18

3. Averment in a declaration on a bill of exchange, that "afterwards and when the bill became due, according to the tenor and effect thereof, to wit, on the 31st of *March*, 1822, it was in due manner, according to the usage and custom of merchants, presented for payment:" Held, sufficient on a special demurrer, assigning for cause that the said 31st of *March* was a *Sunday*. *Bynner* v. *Russell.* 23

4. Where an order is given previously to the delivery of goods to a bailee, to deal with them, when delivered, in a particular manner, to which he assents, and afterwards the goods are delivered to him, a duty arises on his part, on the receipt of the goods, to deal with them according to the order previously given and assented to; and the law infers an implied promise by him to perform such duty: Held, therefore, that an allegation "that in consideration Plaintiff, at the

the request of Defendant, *had* caused to be shipped on board of the Defendant's vessel a quantity of wheat, to be carried safely to *W. T.* for freight to be therefore paid, Defendant undertook to carry safely;" was supported by evidence of the Defendant's having admitted an undertaking to carry, though it appeared that all the wheat was not put on board till the day after such admission. *Streeter* v. *Horlock.* *Page* 34.

5. Avowries, first by *W.* and *T.* for rent due to *W.* and *T.* from Plaintiff, as tenant to *W.* and *T.*; secondly, by *W.* and *T.* and his wife, in right of his wife, for rent due to *W.* and *T.* and his wife, in right of his wife, from Plaintiff, as tenant to *W.* and *T.* and his wife, in right of his wife, were holden to be supported by evidence of an attornment from Plaintiff to *W.* and *T.* and his wife. *Gravenor* v. *Woodhouse and Thomas and Wife.* 38

6. Held that a description of the deed in the declaration as "a certain deed of assignment bearing date, &c., purporting to be made between *T. S.* of the one part and *W. R.* of the other part, and purporting to be a conveyance from *T. S.* to *W. R.* of certain tenements therein mentioned by *T. S.* to *W. R.* for the remainder of a term therein mentioned and yet unexpired," was borne out in evidence by a conveyance of the premises by lease and release between the same parties and under the same date. *Ibid.*

7. The court will not decide on the necessity of pleas, or refer them to the prothonotary, in a question which, on the face of them, appears to be one of doubt and nicety. *Trickey* v. *Yeandall.* *Page* 66

8. In an action of contract, the sirname of one of three joint Plaintiffs was omitted on the record, but the Defendant had pleaded a tender, and paid money into court generally on the declaration: at the trial he attempted, and failed in the proof of a tender, when, after the objection of the omission of the sirname on the record had been taken, the jury found a verdict for the Plaintiff, damages 1*s.*, to be increased to 23*l.* if the Court should not think the omission an objection. On a motion to increase the damages accordingly, the Court declined to interfere. *Longridge and Others* v. *Brewer.* 143

9. A Plaintiff in replevin, whose claim was founded on a custom to demise without deed right of common appurtenant, pleaded generally a custom to demise the right of common, and a demise according to the custom: Held, on general demurrer, that supposing such a custom good, the plea was ill on the face of it, for alleging a demise of a thing in grant without a *profert* of the deed of grant, or without alleging in lieu thereof a custom to demise without deed. *Kezia Lathbury* v. *Arnold and Another.* 217

10. In a declaration on a bill of exchange, the Court refused to strike out

out as unnecessary a count for interest, though, besides counts on the bill, the declaration contained the usual money counts. *Thomas* v. *Hanscombe.* *Page* 281

11. Declaration of two counts for assault and imprisonment. Plea, that Defendant being bail for Plaintiff, arrested him to render him in discharge, and detained him till he had satisfied the demand in the action. Replication, *de injuria.*

It appeared that Defendant, in addition to detaining Plaintiff till he satisfied the demand in the action, detained him an hour longer, till he paid the expences of the Defendant's becoming bail, &c.:

Held, that this was one continuing trespass, and that therefore, in order to recover for that part of it which was unjustifiable, (namely, the additional detention for the bail's expences,) the Plaintiff ought to have newly assigned. *Lambert* v. *Hodgson and Prince.* 317

12. Declaration that Defendant was indebted to Plaintiff as assignee of a bankrupt for goods sold by Plaintiff as assignee. Proof, that the goods were sold by a preceding assignee, whose appointment had been vacated: Held, no variance. *Aldritt* v. *Kettridge.* 355

13. In 1784, a tenant for life, who had a power to lease for twenty-one years, leased for fifty-three years to Defendant, who, in 1813, (nine years after the death of tenant for life,) underlet to Plaintiff: ten years after the death of tenant for life, the remainder-man, after giving to Plaintiff and Defendant notice to quit, granted Plaintiff a new lease, and received the rent thereon for six years, at the end of which time Defendant, who had acquiesced in the transaction, during the interval, distrained on Plaintiff for six years' rent: Held, that after this acquiescence, Plaintiff might, in an action of replevin, plead *non tenuit* to Defendant's avowry under the lease which Plaintiff accepted from him in 1813. *Neave* v. *Moss.* *Page* 360

14. Where a Defendant, after delaying and deluding a Plaintiff with promises to pay, pleaded a plea of judgment recovered, the Court refused to set the plea aside, and permit Plaintiff to sign judgment. *Young* v. *Gadderer.* 380

15. In an action for an excessive distress for rent, the Plaintiff need not allege or prove the precise amount of rent due.

It is no bar to such an action, that between distress and sale of the goods distrained, the parties came to an arrangement respecting the sale. *Sells* v. *Hoare and Others.* 401

16. The declaration charged the Defendant with publishing the following libel against the Plaintiff, a dissenting minister. "A serious misunderstanding has recently taken place amongst the independent dissenters of *Great Marlow* and their pastor, in consequence

quence of some personal invectives publicly thrown from the pulpit by the latter, against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously. *Bucks Chronicle.*"

The Defendant pleaded that the Plaintiff, whilst officiating as minister, published from a part of a chapel assigned to him as minister for the delivery of a sermon, to and in the presence of his congregation, of and concerning one *M. F.*, a teacher of a certain *Sunday* school, the scandalous words following: "I have something to say, which I have thought of saying for some time, namely, the improper conduct of one of the female teachers, her name is Miss *Fair*; her conduct is a bad example and disgrace to the school; and if any of the children dare ask her to go home, she shall be turned out of the school, and never enter it again. Miss *Fair* does more harm than good;" and thereby gave great offence to divers of the dissenters, to wit, one —— and one ——, and occasioned a serious misunderstanding amongst the dissenters. Verdict for Defendant: Held, upon motion to enter a verdict for Plaintiff *non obstante veredicto*, that the plea was a sufficient answer to the libel charged. *Edwards* v. *Bell and Others*. *Page* 403

POST-HORSE DUTY.

Horses hired to assist in dragging a stage-coach up a hill, held not subject to the post-horse duty of $1\frac{1}{2}d.$ a mile under the *57 G. 3. c.* 59., and the preceding acts relating to the same duty. *Dowse* v. *Garett*. *Page* 107

POWER.

Power in a will to let such part of the testator's premises as had been usually granted and demised, and was then in lease for any term of years determinable on lives, to any persons for the like terms and in like manner, and under the like rents, services, and conditions as the same had been usually granted, and the residue of the same premises unto any person for any term of years not exceeding twenty-one years in possession, at the best rent that could be reasonably gotten for the same; so as that no such demise or lease should be made dispunishable of waste, nor without a condition of re-entry on non-payment of the rent, or services thereby reserved, and so as each lessee should execute a counterpart of his lease: Held, that a lease made under this power, of lands which were in lease at the time of the creation of the power, the second lease accurately following the terms of the former lease of the same land, was well executed under this power, though the second

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16. The prothonotary's report is not conclusive against parties who have been put to answer interrogatories before him, but they may except to the report on any material point. *In the Matter of Isaacson, Clarke, and Brookes.* *Page* 272
17. Where, after making his report against the parties, the prothonotary was directed to inspect an account book belonging to one of them, which tended to support the answers given by the parties, but had been accidentally omitted in the first instance, the prosecutor was not allowed on his own application to produce before the prothonotary the clerk who had made the entries in the book. *Ibid.*
18. The Court will not receive affidavits that a party is too poor to take office copies of interrogatories filed against him. *Ibid.*
19. The Court refused to grant an attachment against a witness who omitted to attend a trial after being served on the 3d of *July* with a subpœna dated the 18th of *June*, and calling on him to attend trial on the 2d of *July*. *Alexander* v. *Dixon.* 366
20. A Defendant, under terms of pleading issuably, cannot assign special causes of demurrer, even though the causes assigned be matters of substance. *Blick* v. *Dymoke.* 379
21. Where Defendant was served with an order of court to reinstate forthwith premises belonging to the Plaintiff: Held, that an attachment could not issue against him for disobedience of the order, unless the service of it was accompanied with an oral demand of performance. *Dodington* v. *Hudson.* *Page* 410
22. The writ was returnable on the morrow of *All Souls*. The Defendant surrendered to the sheriff's officer on the 3d of *November*, and to prison on the 5th.

The Plaintiff issued a rule for bringing in the body, to which the sheriff returned *cepi corpus et paratum habeo*. An attachment having thereupon been directed against the sheriff, the Court set it aside on payment of all costs. *The King* v. *The Sheriff of Wilts in the cause Miller* v. *Bridges.* 423
23. Where Defendant, whose name was *John Thomas*, had been arrested as *James Thomas*, and signed a bail-bond as *J. T.*, the Court, notwithstanding such signature, set aside the bail-bond. *Coles* v. *Gum.* 424
24. In an action on a bill of exchange, the court would not compel the Plaintiff to deposit the bill in the hands of the prothonotary for the purpose of enabling the Defendant to inspect it. *Hildyard* v. *Smith.* 451
25. An attachment was issued against a Defendant for not *commencing* within four days (at the end of which time the attachment was moved for,) compliance with an order of court, which it would have taken him three weeks to complete. *Dodington* v. *Hudson.* 464

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him, and debiting him on the other side with the discount. *A.*, also, about two months prior to his death, accepted, payable at his bankers, a bill drawn by *B.* on *A.* for 467*l.*; this bill having been paid away by *B.*, was discounted by the bankers for a holder who did not indorse it, and the bankers were the holders when the bill became due. On the morning the bill became due, before the arrival of the post, the bankers, who had in their hands 1421*l.* of *A.*'s money, wrote off the bill to the debit of *A.*'s account: the same day's post informed them of *A.*'s death two days before they called upon *B.* to pay, and *B.* paid 40*l.* on account of the bill, on a representation from them that 40*l.* would be wanting to make *A.*'s account right. At this time the last promissory note for 1000*l.*, given by *A.* to the bankers, had fifty-three days to run; but the bankers immediately entered that note, as well as the bill of exchange, to the debit of *A.*'s account, allowing on the other side a rebate of discount for the time the note had to run.

The executors of *A.* having, before the fifty-three days expired, sued the bankers for the balance in their hands at the time of *A.*'s death: Held, that the bankers might set-off against the demand of the executors the 467*l.* written off on the bill of exchange, but not the 1000*l.* on the promissory note. *Rogerson and Another, Executors of Stevens,* v. *Ladbroke.* Page 93

SHERIFF.

See Execution, 1. *and* Practice, 12.

A sheriff who levies arrears of taxes under 48 *G.* 3. *c.* 141. No. 5. par. 2. is not entitled to notice of an action to be brought against him for any thing done under the provisions of that act. *Copland* v. *Powell.* *Page* 369

SHERIFF'S OFFICER.

See Arrest.

SHIP-OWNER.

1. The captain of a ship, which was about to sink from the effects of bad weather, put into a port short of his destination, and thinking that the expence of repairs would frustrate the ship owner's adventure, sold the cargo under the order of a Vice-Admiralty Court, though he might have forwarded it to its destination by another vessel, and might have repaired his own ship: Held, that he ought either to have forwarded the cargo or have repaired his own ship; that he had no authority to sell the cargo, and that his owners were liable to the owners of the cargo for the non-delivery thereof, though the bill of lading stipulated only for a conveyance, "the dangers and accidents of the seas and of navigation of what kind soever excepted." *Cannan and Others* v. *Meaburn and Others.* 243

2. In

SOUTHWARK COURT OF REQUEST'S ACT.

SPARRING EXHIBITIONS.

See LIBEL, 1, 2.

STATUTE OF FRAUDS.

STATUTE OF LIMITATIONS.

matters with you as circumstances will permit." The Defendant did not shew that there were any other matters besides the promissory note to which the letter could refer:

Held, that it was properly left to the jury to decide whether this letter referred to the matter of the promissory note, and was a sufficient acknowledgment to take the case out of the statute. *Frost* v. *Bengough*. *Page* 266

2. In *June*, 1812, *A.* sued *H.* and *G.* in the King's Bench, for a debt of 1000*l.*, and *G.* being abroad, writs of *alias capias* and *pluries capias*, returnable in *Michaelmas* term, 1812, and *Hilary* term, 1813, were issued against him with a view to outlawry, but a commission of bankrupt having been taken out against *H.*, the proceedings in outlawry against *G.* were suspended. Except touching at *Deal* in *April*, 1814, on his passage from *St. Ubes* to *Dort*, *G.* never returned to *Great Britain* till *July*, 1819. In *February*, 1821, *A.* commenced a new action in K. B. against *G.* for the same debt as was the subject of the former action, but having failed in his attempt to arrest *G.*, issued, upon this debt, a commission of bankrupt against him in *March*, 1821, and in , 1821, after *G.* had commenced an action to try the validity of the commission, entered up continuances in the action commenced *June*, 1812: Held, that at the time of issuing the commission of bankrupt, the debt in question was a good petitioning creditor's debt. *Gregory* v. *Hurrill*. *Page* 324

STAYING PROCEEDINGS.

Practice. Staying proceedings. *Longridge and Others* v. *Brewer*. 307

SUBPŒNA.

See PRACTICE, 19.

SUMMARY INTERPOSITION.

See ATTORNEY, 3, 4, 5.

A. being committed for a forgery, the prosecutor called on him in prison, and said he had no wish to appear against *A.*, but that the attorney concerned (an attorney of this Court,) would proceed unless his costs were paid, which the prosecutor had no means of paying; he then proposed that *A.* should advance the money; *A.* did so, and it got into the hands of the prosecutor's attorney; notwithstanding this, *A.* was put on his trial, and the prosecutor appeared against him. *A.*, however, being acquitted, applied to this Court to compel the prosecutor's attorney to refund the money, putting in an affidavit of his innocence of the offence charged on him, and that he paid the money because, from his knowledge of the parties, he believed his life in danger.

The

The Court refused to interfere. *Exparte Brookes.* *Page* 105

TENANCY IN COMMON.

Where, under an act of parliament, a canal reservoir was made over lands in which *A.* and *B.* had separate interests, and the act provided "that it should be lawful for the owner or owners of the lands on which any such reservoir should be made to let all the water out of such reservoir once in seven years, for the purpose of taking the fish therein:" Held, that *A.* and *B.* were not tenants in common of this septennial fishery. *Snape and Wife* v. *Dobbs.* 202

TRESPASS.

1. A tenant having omitted to deliver up possession when his term had expired after a regular notice to quit, the landlord in his absence broke open the door, and resumed possession; though some articles of furniture remained.

   The tenant having obtained a verdict against the landlord in trespass for this entry, the Court granted a new trial, holding that the landlord might so enter in such case. *Turner* v. *Meymott.* 158
2. If one does an injury by unavoidable accident, an action does no lie; *aliter*, if any blame attache to him, though he be innocent of any intention to injure; as if he drive a horse too spirited, or pull the wrong rein, or use imperfect harness, and the horse taking fright kills another horse. In such a case the Court refused to grant a new trial, though the judge who presided, after summing up, told the jury the Defendant was liable, even though the accident were unavoidable, and no blame were imputable to him; omitting to direct the jury to consider whether the accident was unavoidable or occasioned by any fault in the Defendant. *Wakeman* v. *Robinson.* *Page* 213

TROVER.

See County Court.

In an action of trover for goods, one of the Plaintiff's witnesses stated on cross-examination that he had heard the Plaintiff say he had been discharged under the Lords' Act subsequently to the sale of the goods; a verdict having been found for the Plaintiff, the Court discharged a rule *nisi* to set it aside, which had been moved for on the ground that the Plaintiff's declaration shewed he had no title to sue. *Summersett* v. *Adamson.* 73

UNNECESSARY COUNTS.

See Pleading, 10.

VARIANCE.

See PLEADING, 1. 8. 12.

VENUE.

The Defendant cannot change the venue after an order for time to plead, on the terms of taking short notice of trial for adjourned *London* sittings after term. *Nun* v. *Taylor*. *Page* 186

WAIVER.

A writ served in *November*, called on Defendant to appear in *June:* an admission of debt by Defendant, subsequently to service of the writ, and request of time to pay such debt, held a waiver of the irregularity. *Rawes* v. *Knight*. 132

WARRANTY.

Warranty. "To be sold, a black gelding, five years old; has been constantly driven in the plough — Warranted:" Held, that the warranty applied to soundness only. *Richardson* v. *Brown*. *Page* 344

WASTE.

In a writ of waste, it appeared that the Defendant had (though not within six years) cut down timber on an estate in the proportion of thirty-seven to fifty; but it was admitted that many of the trees had been felled for the benefit of the estate. The jury, — who were directed to find for the Plaintiff if they thought the felling injurious to the inheritance, for the Defendant if not injurious, — having found for the Defendant, the Court granted a new trial. *Redfern* v *Smith*. 382

WRIT OF RIGHT.

Amendment is so little favoured in a writ of right that, after an amendment h[illegible] been made under a judge's order, the Court discharged the order. *Tooth* v. *Boddington*. 208

END OF VOL. I.

Printed by A. Strahan, Law-Printer to His Majesty,
Printers-Street, London.